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INVENTING JUDICIAL REVIEW: ISRAEL AND AMERICA

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In American constitutional law, the existence of a constitutional text appears essential for the derivation of judicial review. This textual derivation is considered either direct because the founders' expectation of judicial review is explicitly inscribed in the Constitution, or indirect because the written character of the document itself implicitly establishes the text as a "law" that judges are both qualified and obliged to enforce against the other branches of government.[1] In either case, the textuality of the Constitution is the key for the conventional justifications of American judicial review.

Israel, by contrast, has no written constitution. Israeli judges and legal scholars deduced from this fact that legislative supremacy was the operative constitutional rule and that courts could not justifiably invalidate legislative acts. During the past two decades, however, a series of Israeli Supreme Court decisions have raised increasingly extensive doubts about this deduction. Legislative supremacy is still the hornbook rule in Israeli constitutional jurisprudence; but this rule now appears more grudgingly than complacently applied. Following Thomas Jefferson's dictum that each generation should compose its own constitutional regime—and his calculation that for this purpose a generation was thirty-four years[2]—we might say that the second generation of Israeli judges has cautiously moved toward inventing a practice of judicial review. The contemporary Justices of the Israeli Supreme Court have not openly announced a new rule justifying judicial review; but, in the time-honored fashion of common law judges, their practices are increasingly in tension with the old rule. A new rule for judicial review might therefore emerge from these practices.

The story of this gradual process in Israeli jurisprudence is worth telling for its intrinsic interest. For an American audience, and for an American constitutional lawyer, this story is also—and perhaps even primarily—worthwhile for the light that the Israeli developments cast on American constitutional history. The central comparative historical lesson that emerges from the Israeli experience is the influence of

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[1] John Marshall's argument for judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), was pointedly indirect, though this may more reflect his limited view of the role of authorial intent in construing the Constitution than his belief that the founders did not themselves anticipate judicial review. See Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985). For the view that the founders did directly intend judicial review, see, e.g., Black, An Astonishing Political Innovation: The Origins of Judicial Review, 49 U. Pitt. L. Rev. 691, 696 (1988) ("John Marshall was assuredly right to see this as a question of no great difficulty. . . . Indeed, the Framers manifestly thought it, as do I, obvious enough to go without saying.").

[2] Letter to James Madison (Sept. 6, 1789), in 15 Papers of Thomas Jefferson 393 (J. Boyd ed. 1950).

social and political conflict in pressing judges toward the practice of judicial review. The Israeli experience cannot, of course, show that the American institution of judicial review would have arisen without our constitutional text. The Israeli experience cannot show that the Israeli practice itself would have arisen without the American constitutional text, since the prior existence of the American model of judicial review clearly has influenced the Israeli judges. Nonetheless, there are two reasons why the Israeli and American experiences can be read at least to suggest a common historical basis for the development of judicial review without regard to textual constitutional command, and why the Israeli experience helps to explain the prior American development of judicial review.

First, Israeli jurisprudence had an alternative to the American model for judicial conduct—the British example of judicial deference to legislative supremacy. At the outset, Israeli judges explicitly relied on this model to explain their subordinate relation to the Knesset, the Israeli Parliament.[3] Large portions of Israeli law had been directly carried over from the British Mandatory Authority in Palestine. Moreover, under the Mandatory regime, English law was relied on to fill "gaps in the local law" and Israeli lawyers were "familiarized and impressed . . . with the ways of English law and judicial administration."[4] The British experience was thus readily available to teach Israeli judges that a democratic legal system could exist without judicial review.

Nonetheless, in small and then in larger ways during the second generation, Israeli judges drew themselves away from this British lesson and toward the American example. This was evident in the increased explicit citation of American constitutional law cases by the Israeli Court;[5] and less obviously but more fundamentally present in the Israeli cases' implicit tracing of the American institutional relations between court and legislature. Notwithstanding the direct parallels between Britain and Israel—both democracies without written constitutions—some deeper aspect of the American model pulled the Israeli judges toward its orbit.

The second basis for finding parallels in the Israeli and American

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[3] See, e.g., Attorney General v. Matana, 16 Piskei Din [P.D.] 430, 467 (1962) (Berinson, J.) ("England is from a conceptual point of view the closest [comparison] to Israel . . . for in both countries there is no formal Constitution"); Likhovski, The Courts and the Legislative Supremacy of the Knesset, 3 Isr. L. Rev. 345, 363-64 (1968) ("Israel like Britain has no written constitution.").

[4] Laufer, Israel's Supreme Court: The First Decade, 17 J. Legal Educ. 43, 44-45 (1964).

[5] See Lahav, American Influence on Israel's Jurisprudence of Free Speech, 9 Hastings Const. L.Q. 23 (1981).

judicial development is their shared gradualism in the evolution of judicial review. American observers looking to *Marbury v. Madison* can easily miss the caution and even ambiguity of that supposed great fount of judicial review. Many current observers readily disregard the significance of the absence of any direct endorsement of judicial review in the text of the Constitution; they fill the gap with Hamilton's *Federalist* Number 78 or excerpts from Madison's Notes on the Federal Constitution,[6] without reflecting on the fact that the founders were capable of textually inscribing judicial review authority with words of greater specificity than they actually chose.[7] This puzzle does not demonstrate that the founders did not intend judicial review; it does suggest, however, that they were cautious, perhaps uncertain or uneasy, about its justification and implications—a caution echoed between the lines of Marshall's text in *Marbury*. From this gradualist perspective, it is not surprising that the power to invalidate congressional acts claimed in *Marbury* was not exercised a second time by the Court until fifty-four years later.[8]

Like the Israeli experience, the American institution of judicial review did not spring full-blown from the founding document but only gradually came into focus (or, one might say, into being). Indeed, if parallels in elapsed time from the founding moment is our touchstone, there is a direct correspondence in the Israeli and American experience. From the American Declaration of Independence, twelve years passed until a new state organization was adopted in response to fears about governmental paralysis, particularistic self-aggrandizement among officeholders, and threats to the internal peace and external security of the new nation; and another fifteen years elapsed until the judiciary of this newly organized state explicitly

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[6] The Federalist No. 78 (A. Hamilton); Notes of Debates in the Federal Convention of 1787 Reported by James Madison (1966 ed.).

[7] Article VI of the Constitution, which is limited to state judges and state laws, is the only explicit textual directive to judges regarding their duty to invalidate laws inconsistent with the Constitution. It provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. This provision implicitly suggests that state judges are not equally bound by federal laws not "made in Pursuance" of the Constitution; but this is surely a less direct way of instructing judges—and only state judges, at that—regarding their authority to invalidate unconstitutional federal laws, as compared to the clear command regarding inconsistent state laws. Moreover, from the drafting history of Article VI there is good reason to believe that no invalidating authority over congressional acts by state or federal judges was specifically intended by the phrase "in Pursuance thereof." See Strong, Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes, 55 N.C.L. Rev. 1, 35-36 (1976).

[8] See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (overturning Missouri Compromise of 1820); infra text accompanying notes 137-38.

claimed a special role for itself in safeguarding the institutional integrity of the constitutional scheme. This twenty-seven year span between American independence and *Marbury* would, on the Israeli side, take us from 1948 to 1975 when, as this account will show, the Israeli Supreme Court had just taken its initial steps toward devising a special protective role for itself—a move influenced by concerns about governmental paralysis, particularistic self-aggrandizement among officeholders, and threats to the internal peace and external security of the new nation.

I. THE FIRST GENERATION: TOWARD AN INDEPENDENT JUDICIARY

The Israeli Declaration of Independence, proclaimed on May 14, 1948 as the founding act of the state, contained two promises. One was a commitment of principle:

> The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.[9]

The second promise was, in effect, structural; the Declaration established a "Provisional Government" which would act for the state "to be called 'Israel' . . . until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948."[10] This second promise was never fully kept. Although an Elected Constituent Assembly was indeed convened, this body never adopted a Constitution. Instead, after a year's intense debate, the Constituent Assembly chose to transform itself into the Knesset, the Parliament of Israel.[11]

This transformation raised an intriguing jurisprudential possibil-

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9 Declaration of the Establishment of the State of Israel, pt. 3 (1948), reprinted in 1 Laws of the State of Israel 3-4 (1948) [hereinafter Declaration of the State of Israel].

10 Declaration of the State of Israel, pt. 2, supra note 9, at 4.

11 See Likhovski, supra note 3, at 345-46, 358. There is an ironic parallel here with the early American experience: the Constitutional Convention of 1787 also decided to disregard its own constitutive instructions to propose amendments to the Articles of Confederation by reporting back to the Continental Congress. For James Madison's justification of this disregard, see The Federalist No. 40, at 247-55 (J. Madison) (New Amer. Library ed. 1961).

ity. If the Knesset owes its existence—and its claim to supreme legislative authority—only to the apodictic proclamation of the Elected Constituent Assembly, and if the Assembly acted in violation of the directive establishing it, a breach of promise has occurred that calls for a remedy. Why not, then, a judicial remedy? To be sure, the Israeli courts themselves were established by the acts of this Knesset; one might say that these courts therefore had no independent source of authority on which to base any remedial action against the Knesset, and that they would indeed delegitimize themselves by questioning the warrant of their creator.

A bold judge—an Israeli John Marshall—could, however, certainly write around this difficulty. The opinion in *Marbury v. Madison* [12] charts the way for such an Israeli version:

> Our Declaration of Independence not only promises a Constitution; in its specification of substantive limits on state authority, it *is* a Constitution, and judicial enforcement follows from the very nature of this fundamental law. As judges, we owe allegiance not to the Knesset but to the state of Israel and the principles on which it was founded. The basic foundational principles are two-fold: that specific substantive guarantees will be respected and that there will be a Constitution. If the Elected Constituent Assembly violated this principle, and if the Knesset does nothing to remedy that violation, the courts must act.

It was, however, clear at the outset that the newly constituted Israeli Supreme Court would not write this opinion. To the contrary, in the first year of statehood, the Israeli Supreme Court explained:

> The [Declaration] . . . was only to confirm the fact of the founding of the State and of its establishment for purposes of its recognition in international law. It expresses the vision of the people and its faith, but there is nothing in it of a constitutional law which determines the effectiveness of the enactment of other laws and ordinances or their invalidity.[13]

This conclusion could be justified by strong prudential considerations. The question whether Israel should have a formal written Constitution, and specifically whether judicial review of legislative enactments would be appropriate for the new state, was much more intensively explored by the Elected Constituent Assembly than by the thirty-seven self-appointed people who proclaimed the Declaration of the Establishment of the State of Israel as " 'members of the People's Council, representatives of the Jewish Community of Eretz-Israel and

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12 5 U.S. (1 Cranch) 137 (1803).

13 Zeev v. Acting Dist. Comm'r, 1 P.D. 85, 89 (1948).

of the Zionist Movement.' "[14] The Declaration was more a proclamation of war—an assertion that the state of Israel would exist notwithstanding Arab hostility—than a carefully reasoned explication of the character and structure of the state.

In the comparative calm of the succeeding year, arguments were mustered against a written Constitution on several grounds: that Israel's fundamental commitment to an "In-Gathering of the Exiles" meant that the state should not define itself prematurely before all (or at least many more) Jews had come home from elsewhere; that a written Constitution for Israel would connote a diminished status for the Torah as the basic law of the Jewish people; that the effort to draft a Constitution, both in its general conception and in its particular provisions, would exacerbate tensions that were already apparent between religious and secular Jews in Israel; that the immediate urgency of the unresolved Arab hostilities would, as a practical matter, lead to approval of vast executive powers that would distort the very purpose of a written constitution; and that judicial review was itself not a good idea, but was fundamentally inconsistent with democratic principles. For an Israeli judge immediately to conclude that a judicially enforceable Constitution already existed—notwithstanding these powerful objections endorsed by the Elected Constituent Assembly—would have been (to put it mildly) an act of extraordinary chutzpah.[15]

This immediate judicial conclusion would, moreover, have been inconsistent with the underlying ethos of the founding moment in the life of any state: the belief that a unified purpose transcends any internal divisions, either because this purpose is genuinely and mutually shared by those who are constituting themselves as the new state or

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[14] See Nimmer, The Uses of Judicial Review in Israel's Quest for a Constitution, 70 Colum. L. Rev. 1217, 1243 (1970) (quoting the Declaration of the Establishment of the State of Israel).

[15] See Shapira, Judicial Review Without a Constitution: The Israeli Paradox, 56 Temp. L.Q. 405, 408-10 (1983). The direct American parallel for a contrary judicial ruling would not have been Chief Justice Marshall's opinion in *Marbury*; it would have been for a state court judge in 1777 to rule that the principles enunciated in the Declaration of Independence were binding and judicially enforceable in the new nation notwithstanding the states' failure to acknowledge this in adhering to the Articles of Confederation. Abraham Lincoln did advance this argument many years later to establish the wrongfulness of slavery. Lincoln alleged that the Declaration of Independence took precedence over the Constitution; its promise of equality, he said, was the "apple of gold" at the center of the national enterprise and the Constitution was merely the "picture[-frame] of silver." J.P. Diggins, The Lost Soul of American Politics: Virtue, Self-Interest and the Foundations of Liberalism 319 (1984). Note also the comparable constitutional arguments of some abolitionists, that slavery could be judicially invalidated. See A. Kraditor, Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834-1850, at 189-95 (1969). Whatever the plausibility of this argument in Lincoln's time, no one at the founding moment would have been persuaded.

because the very purpose of the coming-into-being of this new state is to permit some within it to prevail over others. In either case, the very idea that a formal Constitution is necessary in a new State to prevent a majority from ignoring the interests of a minority is uncomfortable to acknowledge. The Elected Constituent Assembly in the new state of Israel denied the necessity of a formal written Constitution. Indeed, the Assembly's act converting itself into the first Knesset carried a symbolic implication of legislative supremacy almost as bold as Napolean's seizing the crown from the Pope's hands to make himself Emperor of France.

From the outset, the Israeli judges accepted the basic premise of legislative supremacy. Even with this acceptance, however, there were two different judicial responses available: to follow a course of unquestioning deference to legislative enactments and by extension to the actions of Cabinet ministers directly responsible to the Knesset; or to offer only grudging acquiesence and to claim a role for independent judicial scrutiny by narrowly construing legislation and confining ministerial discretion. During the two decades following independence, the Supreme Court pursued both alternatives notwithstanding their apparent inconsistency.

Part of the explanation for the inconsistent pattern of judicial decisions during this time rests in the working arrangement of the Court. The Supreme Court sits in panels of either three or five judges, depending on the character of the case.[16] The full complement of Justices on the Court (consisting of twelve today) virtually never sits together.[17] Thus it is possible for conflicts to arise among panels and there is no formal mechanism in the Court's operating rules for resolving these conflicts.[18] On this basic question of the Court's inclination toward an independent or a deferential posture regarding legislative action, inconsistencies arose not simply from the happenstance of differently composed panels; there were both underlying disagreement within the Court[19] and discernible tension in the attitudes of individual Justices.

Both the inconsistent judicial stances and the tensions in individ-

16 See sec. 10, Basic Law: Courts (1984).

17 For a rare exception, see the *Shalit* case, discussed infra text accompanying notes 86, 88-98.

18 The President of the Court has authority to constitute the panels on a case-by-case basis and it appears that occasionally, "in ideologically charged cases," this authority has been exercised with purposeful attention to the issues raised in the case. Shetreet, Reflections on the Protection of the Rights of the Individual: Form and Substance, 12 Isr. L. Rev. 32, 41 (1977).

19 For a suggestion of consistent patterns of bloc voting on the Court beneath the inconsistent results in various cases "which are ideologically charged in broad, general lines," see id. at 63-67.

ual judges' attitudes during this era are highlighted in two cases decided in the early 1950s. First, in the *Rabasiya Village* case,[20] military authorities had expelled the Arab residents of the Galilee village of Rabasiya soon after the 1948 war for independence. Unlike many Arabs who fled from Israel at this time, these Arabs remained but were barred from returning to their village. In 1951, they finally brought suit to obtain a restraining order against the Israeli military commander.[21] In his opinion, Justice Landau noted that the village was not "in a border region" and that, even if the military originally intended to use the village for some security purpose, they had not taken any action, that "the village remains desolate," and that the displaced villagers "pose a grave human and economic problem that will continue to bother the authorities."[22] In light of these facts, Justice Landau asked: "Do there truly exist substantial security considerations that prevent a reasonable solution?"[23] He (almost) answered this question as follows:

> Counsel for the [villagers] . . . says that the respondent's refusal to allow the petitioners to return to their village derives from victoriousness and vindictiveness, and that the security reasons are no more than a mask. . . . [The military commander] took oath before us that he took into account only security considerations. We have to admit that in view of the facts . . . it was not easy to trust the candor of these words.[24]

Having expressed his disbelief in the government's good faith, Justice Landau nonetheless came up against a barrier that (as he saw it) conclusively precluded judicial intervention. Legislation explicitly permitted the Prime Minister or the Defense Minister to present a certificate, in any court proceeding, refusing to disclose the reasons for actions on the ground that disclosure could impair state security. Such a certificate had been filed in this case and, Landau stated, it "precludes . . . any possibility of material inquiry and . . . in effect frustrates from the very start any attempt to prove . . . lack of good faith."[25] Notwithstanding the patent implausibility of the government's security argument and Justice Landau's open skepticism about "the candor" of the military commander's sworn testimony, he nonetheless felt compelled to conclude: "[U]nfortunately finding ourselves in a state of ignorance, we are not prepared to dismiss altogether the

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20 Atzlan v. Commander & Military Governor of the Galilee, 9 P.D.(1) 689 (1955).
21 Id. at 690-93.
22 Id. at 694.
23 Id. at 695.
24 Id.
25 Id. at 696.

possibility that there exists a genuine security consideration, of which we were not informed, sufficient to justify the [government's] position. That is decisive of the petition."[26]

This can be viewed as a virtually supine display of judicial deference to executive authority. But Landau revealed an underlying tension by refusing to end his opinion notwithstanding his ruling that the petition must be dismissed because the Defense Minister's certificate barred any judicial inquiry. "We cannot conclude," he said, "without adding two comments."[27]

Landau's first comment was directly critical of the government's dealing with the villagers: "We are not convinced that the authorities did all they could to terminate the painful affair of the Rabasiya villagers in proper manner. . . . It is time now for the authorities to reconsider the entire affair and for such inquiry to be effected at the highest possible level."[28] From the perspective of American judicial practice, this is an extraordinary statement. If an American judge had concluded, as Landau did, that judicial role constraints barred independent inquiry into executive action, he might have embellished this conclusion with a disclaimer that he nonetheless did not intend to convey approval of the action. Further, an American judge might even have hinted that, if he had occupied some role other than judge, he might have opposed this action. This American judge, however, would almost certainly have ended these observations by noting that precisely because he was barred from independent judicial examination of the executive action, it was an issue of "policy" on which he could not express an opinion.[29] Justice Landau's opinion, by contrast, reads as if the very constraint imposed on him by the unreviewability of the government's security claim liberated him to express a direct view on the merits of the controversy.

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26 Id. at 695.

27 Id.

28 Id.

29 Justice Frankfurter was among the most practiced opinion-writers in this genre. For example, compare his concurring opinion in *Dennis v. United States* with Justice Landau's approach:

> [W]e are not legislators . . . [and] direct policy-making is not our province. . . . It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. . . . No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. . . . [But] it is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours.

341 U.S. 494, 539, 549-50 (1951).

Landau's second comment was openly critical of the legislation permitting the Defense Minister's certificate.

> This proceeding once again highlights the deficiencies in the rules of evidence that prevent legal examination of the "security reasons" argument—both regarding the merits of such reasons and the question whether the entire argument is made in good faith. This necessarily causes citizens to have feelings of deprivation and suspicion as to the good intentions of the authorities. . . . It seems to us that the legislature should duly consider this matter. We strongly believe that it is possible to find a solution that will satisfy the security considerations that are decisive in the present situation of our country, and will nonetheless allow a degree of judicial inquiry into such security reasons . . . .[30]

The legislature did not act on this invitation until fifteen years later, when it authorized the Supreme Court to inquire into the reasons why the Prime Minister or Defense Minister certified that disclosure would endanger security and to override this certification in the interests of "the administration of justice."[31] In the interim, there were numerous cases where government certification barred judicial inquiry and, while some Justices continued to express discomfort at the result, the Supreme Court nonetheless persisted in its deferential posture.[32]

A second case decided in the same year as *Rabisiya Village* appeared to express the same deference toward executive authority. In the *Kol Ha'am* case,[33] the Minister of the Interior imposed a ten-day publication suspension on a Communist party newspaper for publishing an editorial accusing the government of encouraging Israeli youth to join American fighting forces in Korea. A Knesset statute authorized the Minister to suspend newspaper publication if "in [his] opinion, [it was] likely to endanger the public peace."[34] The Court unanimously refused to overturn the Minister's action: "Whether these slanders are liable to cause so much anger as to endanger the public peace is not for us to decide. This matter is left by law to the

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30 *Atzlan*, 9 P.D.(2) at 696.

31 535 Sefer Hahukim (Primary Legislation) 192 (1967-68), cited in Shapira, supra note 15, at 446 n.142.

32 In one case, for example, the government barred a citizen from travelling outside Israel allegedly because of subversive activities. In the court proceeding, however, the government refused by certificate to reveal the basis for its action. The Court denied relief, with Justice Landau acidly observing, "one cannot debate with a sphinx." Kaufman v. Minister of the Interior, 7 P.D.(1) 534, 541 (1953).

33 Kol Ha'am v. Minister of the Interior, 7 P.D.(1) 165 (1953). The Court was composed of Justices Olshan, Agranat, and Zilberg.

34 Press Ordinance § 19(2) (1933), reprinted in R. Drayton, 2 Laws of Palestine 1225 (1933).

determination of the Minister of the Interior."[35] Just nine months later, in response to an editorial attacking the government for supporting "American warmongers," the Minister again suspended publication of the same Communist newspaper. This time, however, the Court overturned the Minister's action.[36] Justice Agranat—the only judge who had also served on the earlier *Kol Ha'am* panel[37]—wrote the opinion for the Court, revealing a sharply contrasting judicial stance as compared to the first *Kol Ha'am* decision as well as to the *Rabisiya Village* case.

The Court held that the censorship statute must be construed to require a specific ministerial finding of "probability" of harm rather than a mere "bad tendency."[38] In adopting this narrow construction, the Court explicitly relied on the Declaration of Independence: "[its] basing of the State 'on the foundations of freedom' and the securing of freedom of conscience, mean that Israel is a freedom-loving State."[39] The Court quickly acknowledged that the Declaration was not a "constitutional law"; but, it said,

> insofar as [the Declaration] "expresses the vision of the people and its faith," we are bound to pay attention to [it] when we come to interpret and give meaning to the laws of the State . . . for it is a well-known axiom that the law of a people must be studied in the light of its national way of life.[40]

After narrowly construing the statute, the Court determined that the Minister had not shown a sufficient probability of danger to the public peace and that he failed to give sufficient weight to the "great social value . . . [of] freedom of expression."[41] In reaching this determination, the Court necessarily made an independent assessment of the gravity of the security concerns asserted by the Minister. At one point in its opinion, however, the Court denied this independent assessment, asserting that "estimation of the effect . . . on the public peace . . . is always within the sole jurisdiction of the Minister." Nevertheless, the Court set out so many different bases for independently examining the Minister's judgment as to swallow the "sole ministerial

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35 *Kol Ha'am*, 7 P.D.(1) at 166. The Court's opinion was unsigned.

36 Kol Ha'am v. Minister of the Interior, 7 P.D.(2) 871 (1953), translated in 1 Selected Judgments of the Supreme Court of Israel 90 (Goitein ed. 1962) [hereinafter Selected Judgments].

37 The other members of the second *Kol Ha'am* panel were Justices Sussman and Landau. *Kol Ha'am*, 7 P.D.(2) 871, 1 Selected Judgments, supra note 36, at 90.

38 Id. at 883, 1 Selected Judgments, supra note 36, at 104.

39 Id. at 884, 1 Selected Judgments, supra note 36, at 105.

40 Id.

41 Id. at 881, 1 Selected Judgments, supra note 36, at 101.

jurisdiction" rule in exceptions.[42]

In this second *Kol Ha'am* case, the Court took a strikingly independent judicial posture, both in its willingness to reassess the basis for the Minister's decision and in its use of the Declaration of Independence as a source of legal norms. In all of this, there was a flavor of American jurisprudence. The Court repeatedly cited American free speech cases in the course of its opinion.[43] The *Kol Ha'am* opinion was, moreover, written by Justice Shimon Agranat, one of two sitting members of the Israeli Supreme Court who had received primary legal training in the United States.[44] The principle of legislative construction adopted in *Kol Ha'am* also has its American counterpart in the rule that a court will assume legislators intended to respect constitutional norms unless the enactment clearly states otherwise.[45] In the American context, however, this rule is often explained as a restraint on judicial authority, since it limits the occasions for judicial proclamations of constitutional invalidity. In the Israeli context, this rule of construction gives a "constitutional-interpretive" role to the courts that they would not otherwise possess. By proclaiming that the Court would "study" Knesset enactments "in the light of [Israel's] national way of life," Justice Agranat gave the Court an independent (albeit not final) role in defining the "national way of life."[46]

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42 The Court stated:

> We would like to add to our summary of the rule a word about the phrase, "in the opinion of the Minister of Interior", in paragraph (a) of section 19(2). We must hold that the estimation of the effect of matters published on the public peace, in the light of the circumstances, is always within the sole jurisdiction of the Minister of Interior, so that the High Court of Justice will not interfere with the latter's discretion unless, in making that estimation, he has departed from the test of "probability", having regard to the meaning of the notion "endangering the public peace"; unless he has paid no consideration—or, at all events has paid mere cursory consideration—to the important interest connected with the freedom of the press; or unless he has erred in the exercise of his discretion in some other manner, having been misled by considerations that are devoid of any relevance, or are untenable or absurd.

Id. at 893, 1 Selected Judgments, supra note 36, at 115.

43 The Court cited Dennis v. United States, 341 U.S. 494 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schaeffer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919); and United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

44 See Laufer, supra note 4, at 45.

45 See Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); Kent v. Dulles, 357 U.S. 116 (1958), discussed in A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 201-02, 216-17 (1964).

46 *Kol Ha'am*, 7 P.D.(2) at 884, 1 Selected Judgments, supra note 36, at 105.

In the 1950s and 1960s, there were other instances besides *Kol Ha'am* where the Israeli Supreme Court engaged in independent scrutiny of executive action accompanied by a narrow reading of legislative authority.[47] During these two decades, however, there was no consistent pattern to Supreme Court decisions. The apparent inconsistency between the first and second *Kol Ha'am* decisions reflects the jurisprudence of the time: for virtually every instance of an independent judicial stance toward executive and legislative action, a competing instance of modest judicial deference could be found.[48]

The second *Kol Ha'am* opinion is regularly invoked today by the Israeli Supreme Court as a cornerstone of its jurisprudence. This recurrent, even ritualized, invocation has a direct American counterpart: like current American citations of *Marbury v. Madison*, Israeli court citations of *Kol Ha'am* overstate the clarity of the early precedent in a way that obscures the novelty of latter-day expansions of judicial authority.[49] During the first two decades of Israel's existence,

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[47] See, e.g., Anonymous v. Minister of the Interior, 8 P.D. (1) 243 (1954) (no statutory authority for police to detain illegally entering Arab for three months to investigate spying charges); Sheib v. Minister of Defence, 5 P.D. 399 (1951) (no statutory basis for refusing employment to a private school teacher on security grounds). See generally Laufer, supra note 4, at 51-55 (examining numerous cases where civil rights were protected, including freedom of speech and supremacy of civil over military jurisdiction); Shetreet, supra note 18, at 34-38 (individual human rights protected by statutory interpretation even in face of clear legislative intent to the contrary).

[48] Regarding the two *Kol Ha'am* decisions first upholding and then overturning the suspension of the Communist party newspaper, the only distinction that one Israeli scholar could find was that in the nine months intervening between them the relations between the Israeli and Russian governments had markedly improved. See Shapira, Self-Restraint of the Supreme Court and the Preservation of Civil Liberties, 3 Iyunei Mishpat 640, 646 (1973), cited in Shetreet, supra note 18, at 45-46. For other inconsistencies regarding independent versus deferential judicial postures, see Shapira, supra note 15, at 425-26.

[49] Twenty years ago, a study of Israeli case law concluded that "[t]he suggestion in *Kol Ha'am* that the [Declaration] be used to give 'meaning to the laws of the state' has not been followed to a significant degree in subsequent cases." Albert, Constitutional Adjudication Without a Constitution: The Case of Israel, 82 Harv. L. Rev. 1245, 1246-47 (1969). For an example of the overstated usage of *Marbury*, see, e.g., its citation in United States v. Nixon, 418 U.S. 683, 703, 705 (1974) (the Nixon tapes case). Cf. Gunther, Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process, 22 UCLA L. Rev. 30, 35 (1974) ("[T]he Court's overbroad reliance on *Marbury* was at the least a non sequitur and at worst dangerous nonsense."). Another example of the purposeful exaggeration of *Marbury*'s authority is in Cooper v. Aaron, 358 U.S. 1, 18 (1958), where the Court claimed that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." The initial draft of the Court's *Cooper* opinion stated that *Marbury* " 'established the basic principle' " of judicial supremacy, but added that " '[t]his decision was not without its critics, then and even now, but it has never been deviated from in this Court. The country has long since accepted it.' " Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 Geo. L.J. 1, 80 (1979) (quoting initial draft). Apparently at Justice

however, the question whether the Supreme Court would exercise significant independent authority remained open. The power of external events, not the force of logic, led the Court toward its present, more consistent, and more outspoken independent authoritative stance.

The 1967 Six Day War, in particular, has had a central impact on the development of an independent judiciary. For Israeli society generally, this was a watershed. The War transformed the country both geographically and spiritually. The stunning military victory gave Israelis a new and exhilarating self-confidence in their capacity to protect their always-threatened new state. The unification of Jerusalem under Israeli authority signified the true end of the Jewish Exile, even more than the founding of Israel. More ominously, the military occupation of Gaza and the West Bank enlarged not only the territory but also the population under Israeli control to include almost one million Arabs who appeared hostile to Israel's very existence.[50] Every Israeli and every Israeli institution were profoundly affected by this transformation.

The specific impact of 1967 on the Supreme Court was less direct and therefore less obvious than its effect on other Israeli institutions. No sharp, definitive break in the Court's jurisprudence occurred in the immediate wake of the 1967 War. But the inability of Israeli political institutions to resolve the underlying social conflicts created or intensified by the War led to heightened public expectations that the judiciary might undertake some ameliorative role. The Court did not rush to embrace this enterprise. Nevertheless, the hopes directed toward the Court, and the apparent paralysis of other institutions in the face of intensifying conflicts, ultimately exerted a strong (if subterranean) gravitational pull on the judges.

A. *The Impact of the 1967 War on Israeli Jurisprudence*

In the twenty years following 1967, the Court has progressively established a more independent role for itself, most notably in its doctrinal developments more actively scrutinizing administrative actions and liberalizing standing requirements for invoking this activist scru-

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Black's insistence, this acknowledgment of uncertainty in and about *Marbury* was omitted from the final opinion. See id.; see also Justice Blackmun's recounting of "one suggestion Hugo Black made to me when I first came [to the Supreme Court]. He said, 'Harry, never display agony in public, in an opinion . . . . Never say that this is an agonizing, difficult decision. Always write it as though it's clear as crystal.' " Jenkins, A Candid Talk with Justice Blackmun, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 26.

[50] See Statistical Table 1, in 1 Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects 442 (M. Shamgar ed. 1982) [hereinafter Military Government].

tiny.[51] In one sense, these developments can be viewed as a continuous outgrowth of judicial doctrine already enunciated before 1967, as in the second *Kol Ha'am* case. Moreover, since these doctrinal developments directly address only administrative actions, they can also be seen as consistent with the continued dominance of the legislative supremacy principle in Israeli jurisprudence.

There is, however, another way to view these post-1967 developments. While precedents can be culled from the earlier decisions anticipating these doctrinal developments, there is also discontinuity in the more thoroughgoing character of the Court's current independent stance. Although the current Court continues to acknowledge the grip of the legislative supremacy principle, the Court appears more eager to confine its operative force (and thus at least implicitly more critical of legislative supremacy) than to approvingly embrace this principle as the touchstone of democratic accountability.[52] The political aftermath of the 1967 War raised profound and disquieting questions about the viability of democratic theory in Israeli society. The role that the Court has claimed for itself with progressively increasing clarity since 1979, as the independent embodiment of the rule of law, is in effect its answer to these questions.

The Court was not, however, quick to offer this answer in the years immediately following the 1967 War. It ultimately moved toward this direction only because questions about the viability of the democratic enterprise persisted with such force throughout Israeli society, and specificially because the actions of the Attorney General and the Knesset directly pressed these questions on the Court.

There were at least three events around 1967 that signified expectations from nonjudicial officials for an enlarged social role for the Supreme Court: first, the concession by the government of Court jurisdiction over actions by military authorities in the newly occupied

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[51] See infra text accompanying notes 77-78.

[52] The legislative supremacy principle has also been explicitly criticized by several Justices who have called for adoption of a written Constitution. See the observations of President Shamgar in Naiman & Avneri v. Chairman of the Cent. Elections Comm. for the Eleventh Knesset, 39 P.D.(2) 225, 261 (1984):

> [I]t is of specific significance and import that the *constitutional* principles defining the fundamental rights be given explicit expression in a legislative act and not remain within an oral legal tradition. In such way there is assurance that the nature and scope of the rights will be defined in clear language, upon which the individual citizen can rest his demands and claims. That is, among other things, the importance and value of a written constitution, and its absence in our system is conspicuous each time a constitutional issue arises in a legal proceeding.

Justice Barak has taken the same position. See, e.g., his unpublished address, Constitutional Law without a Constitution: The Role of the Judiciary, 1988, manuscript at 4 ("I personally am very much in favor of a written constitution.") (copy on file at Cardozo Law Review).

territories; second, the 1968 Knesset law authorizing judges to override governmental refusal to provide testimony on national security grounds; and third, the 1968 law providing a judicialized format for Commissions of Public Inquiry.

1. Jurisdiction over the Occupied Territories

The impact of the 1967 War on the Court is most directly discernible in an action taken in its immediate aftermath by Meir Shamgar, then Military Advocate General in the Israeli armed forces (subsequently Attorney General and now President of the Supreme Court). On June 20, 1967, the Supreme Court heard its first petition from the occupied territories; in that case, counsel for the State "declared that he would not challenge the competence of the Court to review the acts of the military authorities."[53] Shamgar's justification for this governmental concession illuminates the hopeful expectations that have been generally directed toward the Court—expectations to which the Court has responded since 1967 by its increasingly independent stance.

In a retrospective explanation for his "instructions and guidelines" both as Military Advocate General and later as Attorney General regarding the government's jurisdictional concession, Shamgar stated that "judicial supervision of the military arm . . . was regarded from the beginning as an integral part and necessary element of the rule of law."[54] Shamgar acknowledged that none of the extant prescriptions governing military occupation—neither the recognized rules in international law nor the explicit provisions of Israeli domestic law—required judicial supervision. Nonetheless, Shamgar said he was guided in establishing the framework for the military occupation by a belief in the importance of extending " 'humanitarian relief . . . to victims of war without waiting for the international law to develop further and without subjecting the fate of the civilians to the political and legal reality.' "[55] In Shamgar's account, "humanitarian relief" that transcends "the political and [formalistic] legal reality" constitutes the ideal of the "rule of law," and this ideal is thus inextricably linked to judicial supervision. For Shamgar, even though the formal rules of law did not require judicial review of military actions, the rule of law did. As he explained,

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53 Nathan, The Power of Supervision of the High Court of Justice over Military Government, in Military Government, supra note 50, at 114.

54 Shamgar, Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in Military Government, supra note 50, at 43 n.56, 46.

55 Id. at 42 (quoting Shamgar, The Observance of International Law in the Administered Territories, 1 Isr. Y.B. Hum. Rts. 262, 263 (1971)).

> The expression "Rule of Law" refers not only to the vigilant enforcement of the defined norms of a given legal system or, to the formal legality of an act. It comprises the even more important component of respect for law and the confidence and reliance of every individual that justice will be done, a result that can be arrived at only by the overall application of norms of justice and fairness, by the prevention of discrimination, by the certainty of access to courts and other law enforcement agencies and by the introduction of proper supervisory procedures which serve as avenues for the voicing of grievances in individual cases.[56]

In the midst of this text, Shamgar appended a footnote to explain his reference to "the confidence and reliance of every individual that justice will be done."[57] His footnote referred to two Israeli Supreme Court cases: a 1979 decision upholding the military authority's rules controlling press publication in the territories and a 1979 decision overturning a refusal on "security" grounds by the Jerusalem District Commission to issue a license to an Arab applicant for publication of a new journal because it was "not supported by sufficiently detailed evidence."[58] This footnote drew no distinction between the standards imposed by the Court in the occupied territories and in Israel. In both cases, the Court protected free speech values by ensuring that censorship authority for security purposes was "used sparingly and carefully."[59] The context of the two cases, moreover, reflected Shamgar's hope that judicial review might engender "confidence and reliance" in the Arabs subject to military occupation that "justice will be done."[60]

Shamgar's hope may, of course, be entirely misplaced. The Arab grievances against Israel are so deep that the prospect for any Arab "confidence and reliance" in Israeli justice or its Supreme Court might be remote. Many Israeli political figures are also intensely skeptical that any Arabs will be appeased by exercises of judicial review; they believe that such appeasement would in any event undermine necessary military authority. If the issue of Supreme Court jurisdiction had been presented as an open question to the Knesset at the conclusion of the Six Day War, or at any time since, it might not have won endorsement. But the tradition of nonpartisan independence for the offices of both Military Advocate General and Attorney

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56 Id. at 48.

57 Id. at 48 & n.71.

58 Id. at 48 n.71 (citing Al-Talya v. Minister of Defense, 33 P.D.(3) 505 (1979), and El-Asaad v. Minister of the Interior, 34 P.D.(1) 505, 510 (1979)).

59 Id.

60 Id.

General effectively inhibited any political override of Shamgar's position.[61]

The Court itself, however, was not obliged to accept the government's jurisdictional concession. For some time, the Court was openly hesitant in assuming this jurisdiction. The most notable example of this hesitancy was in the 1973 *Rafah Approach* case.[62] The Bedouin petitioner challenged the military authority's action to exclude his tribesmen from their residences in the Northern Sinai. The Court, first of all, noted that "[a]s in earlier cases" the state's attorney "did not dispute the jurisdictional issue, and . . . we shall again assume, without deciding the issue, that jurisdiction does exist."[63] Beyond the persisting tentativeness of this assumption, the Court's hesitancy was more clearly revealed in the conflict among the three Justices on the Court regarding the substantive standards to be applied.

The Court unanimously rejected the petition; all three Justices in effect agreed with Justice Landau's observation that "[t]he extent of the interference of the Court with the actions of military authorities regarding security matters must necessarily be very limited."[64] The three Justices disagreed, however, regarding the bases and the scope of this "necessarily limited" scope of review. Justice Witkon took the most extreme deferential position, stating that military action involving security matters was nonjusticiable because the courts could not competently evaluate such action. Justice Witkon concluded that in such matters, the military commander was in effect a sovereign legislator, and a court has "no possibility of considering [his orders] from the point of view of international law."[65]

Justice Landau was prepared to judge the military commander's action against the international law norms in the Hague and Geneva Conventions only because the commander had voluntarily consented in this specific case to be bound by those norms. This review function, Landau stated, is no different from judicial "checks [on] the actions of an administrative authority according to norms which that authority sets for itself of its own volition and not on the basis of a statute which empowered it to establish such norms."[66] Justice Kister alone posited

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61 For consideration of other factors inhibiting political countermand of this position, see infra text accompanying notes 75 & 131-35.

62 Sheikh Suleiman Abu Hilu v. State of Israel, 27 P.D.(2) 169 (1973) (summarized in English in 5 Isr. Y.B. on Hum. Rts. 384-88 (1975)).

63 Id. at 176.

64 Id. at 177.

65 Id. at 180. See Nathan, supra note 53, at 154-55.

66 27 P.D.(2) at 176.

that, having assumed jurisdiction, the Court should independently judge the military authority's actions by norms of international law even if the authority refused to concede the substantive applicability of those norms. "The Military Commander in any enlightened state," Kister argued, "must act in accordance with the rules of international law which set limits and boundaries to his authority."[67]

Justice Kister's position is now recognized as the authoritative statement by the Supreme Court.[68] It was not, however, until 1983 that the Court clearly decided that it had jurisdiction over the military occupying authority, without regard to the government's concession.[69] The Court thus hesitated for considerable time regarding both the existence of its jurisdiction over the military and the applicable substantive standards regarding the military occupying authorities. The reason for the Court's hesitancy appears to be the implication of judicial supremacy conveyed by this jurisdiction. By 1983, the Court was prepared to endorse this implication (faintly suggestive as it is) because it grasped what Meir Shamgar had originally perceived—that the threat to the ideal of the rule of law implicit in the post-1967 Israeli control of the occupied territories demanded an independent judicial response.

The implication of judicial supremacy in the Court's assumption of jurisdiction arises from the fact that there is no Knesset enactment explicitly authorizing jurisdiction. The Court's claim has, however, been grounded in an expansive reading of two independent bases for its general jurisdiction: its personal jurisdiction over any state officials who "exercise any public functions by virtue of law"[70] and its general statutory authority to "grant relief in the interests of justice . . . [in matters] which are not within the jurisdiction of any other court or tribunal."[71] Under both provisions, it could have been argued that jurisdiction extends only to official action taken under Israeli domestic law whereas the military authorities were acting wholly outside this realm, subject only to whatever international rules and tribunals might purport to govern belligerent military occupations. Some version of this self-denying interpretation had been the judicial practice in other countries. The Israeli Supreme Court's assumption is the first occasion where the domestic courts in any country have asserted

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67 Id. at 183-84.

68 See Nathan, supra note 53, at 145-49.

69 Jamayat & Ors v. The Military Commander of Judea & Samaria, 37 P.D.(4) 785, 809 (1983) (Barak, J.) ("[T]he Supreme Court of Justice is fully authorized to exercise judicial review over acts of the Military Command in Judea, Samaria and the Gaza Strip.").

70 Section 7(b)(2), Basic Law: Courts (1984).

71 Id. § 7(a).

general jurisdiction over its national military authority in occupied territories.[72]

As to the substantive standards, the Israeli Court has applied customary norms of international law. The Court has found the principal bases for these norms in the 1907 Hague Convention regarding "[t]erritory . . . occupied . . . under the authority of [a] hostile army."[73] The 1949 Fourth Geneva Convention set additional standards for the conduct of occupying armies. For the most part, however, the Supreme Court has declined to apply these standards on the ground that they were "contractual or conventional" rules that must be explicitly incorporated into Israeli law by the Knesset before the Court may give them binding force. The Court considered the Hague Convention to be "declarative" of "customary" international law which it regards as automatically incorporated into domestic Israeli law without any explicit Knesset action.[74] The Supreme Court had thus found the substantive criterion for its jurisdiction over the occupied territories in a source extrinsic to Knesset laws. The Court has clearly acknowledged that if the Knesset explicitly countermanded any customary provision of international law, the Court would be bound to abandon it.[75] Such explicit denunciation by the Knesset of hallowed principles of international law seems unlikely, however, in light of the international isolation and obloquy that Israel would suffer.

In sum, the Israeli Supreme Court is exercising jurisdiction that the Knesset has not given it and is enforcing substantive standards that the Knesset has neither enacted nor, as a practical matter, is free to reject. This is not the institution of judicial review; but it nonetheless conveys some suggestion of it.

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72 See Shamgar, supra note 54, at 272-73.

> In a number of cases, inhabitants of the Territories have applied to the Supreme Court of Israel, sitting as High Court of Justice, for orders nisi of the kind known in Great Britain as orders of mandamus, habeas corpus, or certiorari. . . . [A]ccording to legal precedents in municipal courts during the period between the two World Wars (the Military Administration of the Rhineland) and after World War II this legal procedure had been denied to inhabitants of territories under military administration . . . .

Id.

73 Convention IV of 1907, Respecting the Laws and Customs of War on Land, October 18, 1907, Article 42, reprinted in The Hague Conventions and Declarations of 1899 and 1907, at 100, 122 (J.B. Scott ed. 1915).

74 Cohen, Justice for Occupied Territory? The Israeli High Court of Justice Paradigm, 24 Colum. J. Transnat'l L. 471, 484-85 (1986).

75 See Eichmann v. Legal Adviser to the Gov't, 16 P.D.(3) 2033, 2040 (1962); Cohen, supra note 74, at 484 n.48.

2. The Knesset Acts

Additional indications of enhanced expectations directed toward the Court around 1967 can be found in two notable enactments by the Knesset. The Six Day War and the resulting military occupation were not the only source of deep social conflict for Israel in 1967. Other internal conflicts had become starkly visible: most notably, the influx of immigration by so-called Oriental Jews that challenged the hegemony of the European Jews who had dominated the Zionist Movement and the early political life of Israel; and the escalating conflict between religious and secular Jews of European origins. The confidence that arose in Israel from its unexpectedly dramatic military success in the Six Day War paradoxically intensified these internal rifts because they could be acknowledged and pursued in a sustained way without imminent danger to the very existence of the state.

At the time that Meir Shamgar, Military Advocate General and Attorney General, turned to a judicial embodiment of the rule of law ideal as a possible answer to the dangerously polarized implications of military occupation, this same tentative but hopeful turn can be seen regarding other sources of internal conflict. The Knesset itself enacted a law in 1968 changing the rules of evidence that had barred any judicial inquiry into security claims made by the government in litigation brought against it. The new law provided that the Supreme Court could require reasoned justification for any government certification that disclosure would endanger security and further provided that the court could override such certification in the interests of "the administration of justice."[76] This new law did not directly address jurisdiction over challenges to military actions in the occupied territories. In light of the contemporaneous concession of such jurisdiction by the government, however, this law implicitly endorsed the premise of the concession that judges should independently examine governmental actions allegedly based on security needs. Indeed, this law gave general application to this premise beyond the special circumstances of the occupied territories.

The Knesset enacted another law in 1968 that endorsed an even more generalized oversight role for judges in addressing disputed social issues. This law provided for the creation of ad hoc Commissions of Public Inquiry in matters of "vital public importance."[77] Prior law had authorized appointments of such commissions by Cabinet minis-

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[76] 535 Sefer Hahukim (Primary Legislation) 192 (1967-68), cited in Shapira, supra note 15, at 446 n.142.

[77] Commissions of Inquiry Law, § 1, 23 Laws of the State of Israel 32 (1968).

ters or by the Knesset from among its own members.[78] This new law specified that commissions should be initiated by the Cabinet and that the President of the Supreme Court should appoint its members.[79] This enactment reflects both mistrust of the capacity of ordinary political processes to address matters of "vital public importance" and a belief that judges can be trusted to transcend political conflict in such matters.[80]

Soon after the enactment of this law, these judicialized Commissions assumed a powerful social role. In 1973, in the bitter aftermath of the Yom Kippur War, the government initiated a Commission to inquire into the reasons why Israeli military and intelligence forces had not anticipated or been adequately prepared for this war.[81] The Commission, chaired by Supreme Court President Shimon Agranat, placed principal blame on the Army Chief of Staff and the Chief of Intelligence, both of whom immediately resigned. Though the Commission exonerated Prime Minister Golda Meir from direct responsibility, she nonetheless also resigned "and the link between her

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78 See Elman, The Commissions of Inquiry Law, 1968, 6 Isr. L. Rev. 398, 401 (1971).

79 Commissions of Inquiry Law, § 4, supra note 77, at 32. The law also provided that the chairman of the commission must be a Justice of the Supreme Court or a judge of a district court. Id. § 4(b).

80 The model for this new law was drawn from a 1966 Royal Commission Report recommending revisions in the British Tribunals of Inquiry Act of 1921. Under the British act, a practice had evolved for the tribunals appointed by the government to be composed of judges and "eminent leading counsel." Segal, The Power to Probe into Matters of Vital Public Importance, 58 Tul. L. Rev. 941, 959-60 (1984). This practice was not mandated by statute, however, and the 1966 Royal Commission did not recommend such statutory specification. The Knesset Committee Report accompanying the 1968 law acknowledged its reliance on the Royal Commission Report; see id. at 944. It is notable, however, that in mandating judicial appointment of commission members the Knesset did not follow the British approach, which trusted that politicians would be adequately constrained by unwritten practice. In effect, the Knesset accepted the advice against following the British example offered by Lord Justice Salmon, the chairman of the Royal Commission, in a 1967 lecture he delivered in Israel: "It would certainly be desirable in most countries that once the government has decided to set up a Tribunal, the members should be nominated by the head of the Judiciary so as to avoid any appearance of possible political bias." Salmon, Tribunals of Inquiry, 2 Isr. L. Rev. 313, 324 (1967).

81 See Shetreet, The Yom Kippur War Commission: The Overall Judgment—Favourable, 8 Mishpatim 74, 79 (1977):

> The time when the commission was appointed to set up its investigation was a time of social and political crisis, a loss of the people's confidence in the political leadership, and a serious blow to the people's confidence in the high command of the Israel Defense Forces, which was aggravated by widely publicized bitter exchanges of verbal attacks by army generals. The authority and the power of the cabinet were not reinstated even after the general elections which were held after the Yom Kippur war. . . . The findings of the Agranat Commission were expected to serve as a basis for healing the acute social crisis and for reinstating the people's confidence in the political leadership and in the high command of the Israel Defense Forces.

resignation and the Commission's findings and conclusions seemed obvious."[82]

Subsequent Commissions have been convened to address comparable social crises in Israel: most notably, the 1983 Kahan Commission to evaluate the responsibility of Israeli officials for the Phalangist massacre in the Beirut refugee camps and the 1987 Landau Commission to consider the forced confessions and perjured convictions obtained by the Shin Bet, Israel's internal intelligence force.[83] The Commissions have interpreted their mandate widely; the Kahan Commission, for example, considered itself "obligated to consider not [only] the legal aspects of the subject but also, and occasionally primarily, its public and moral aspects."[84] The Commission's judicialized format powerfully reinforced other social factors that were pressing the Israeli judiciary toward generalized oversight of executive and legislative actions.[85]

B. *The Court's Initial Response*

The Court's immediate post-1967 decisions in *Shalit v. Minister of the Interior*[86] and *Bergman v. Minister of Finance*[87] suggest that the Justices were themselves tentatively acknowledging the need for an enhanced judicial oversight role.

1. *Shalit v. Minister of the Interior*

Shalit was the most dramatic of the two decisions. The case arose as a deceptively simple issue of statutory interpretation with almost no immediately apparent practical significance. Nonetheless, the social import of the *Shalit* case was so powerful that it has had a lasting influence on the Court's conception of its own role.

Under Israeli law, all permanent residents were required to register with the Ministry of Interior; the registration form provided sepa-

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82 Segal, supra note 80, at 969.

83 For an extensive discussion of the Landau Commision Report, see Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, 10 Cardozo L. Rev. 529 (1988).

84 The Commission of Inquiry into the Events at the Refugee Camps in Beirut—Final Report 63 (authorized trans. 1983), quoted in Segal, supra note 80, at 949. The Kahan Commission was composed of two Supreme Court Justices, President Yitzhak Kahan and Justice Aharon Barak, and a Major General in the Israeli Army Reserve, Yona Efrat. Segal, supra note 80, at 945.

85 See Shetreet, Judicial Independence and Accountability in Israel, 33 Int'l & Comp. L.Q. 979, 983 (1984).

86 23 P.D.(2) 477 (1970), Special Volume Selected Judgments, supra note 36, at 35.

87 23 P.D.(1) 693 (1969).

rate indications for "religion" and for "nationality" or *leom*.[88] In filling out registration forms for his two young children, Benjamin Shalit stated that they had no religion but that their *leom* was Jewish. The Interior Ministry refused to accept this registration on the ground that the definition of *leom* in the statute depended on the religious or *Halachic* law and, on this basis, Shalit's children did not qualify as Jews because their mother was not Jewish, either by birth or conversion.

Recognized status as a Jew has important practical significance under Israeli law in at least two contexts. First, Jewish immigrants attain automatic citizenship under the Law of Return; and second, an Israeli resident must be Jewish to come under the jurisdiction of the rabbinic religious courts in matters of marriage and divorce.[89] Registration of the Shalit children had no connection with either of these contexts, however; they were Israeli citizens by birth and the rabbinic courts would not accept them as Jews because of the *Halachic* law even if their *leom* registration identified them as Jewish.

These kinds of practical consequences were not the issue either for Shalit or for the Israeli public which responded to the filing of this suit with passionate outpouring. Deep symbolism was at stake: the identity of the state of Israel. The Israeli Declaration of Independence proclaimed "the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State" and accordingly "declare[d] the establishment of a Jewish State in Eretz-Israel [the Land of Israel], to be known as the State of Israel."[90] The question for Shalit was whether, because his children did not qualify as Jews under the religious law, they were excluded

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[88] There is no precise English translation of the Hebrew term *leom*. "Nationality" perhaps comes closest, though the concept of *leom* had its origins in nineteenth-century central European multiethnic countries and referred to common ethnic, cultural, and linguistic links among distinct groups in those countries. See Rubinstein, Who's a Jew, and Other Woes, Encounter, Mar. 1971, at 84 & n.1. The concept apparently has the same root as the background source for Chief Justice Harlan Fiske Stone's conception of "discrete and insular minorities" discussed in his famous footnote number four in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 & n.4 (1938). See Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 Yale L.J. 1287, 1289-92 (1982).

[89] There is no civil regulation of family status in Israeli law. Regulation of such matters is delegated to religious tribunals who exercise jurisdiction based on the particular religious affiliations of Israeli residents. Accordingly,

> a person who regards himself as a Jew, but is not considered Jewish by the Rabbinical Courts, is in fact unable to exercise the right to marry unless he belongs to some other recognized community. He does not come under the jurisdiction or law of any religious community and has no personal law. This problem has arisen mainly with regard to children of Jewish fathers and non-Jewish mothers.

Rubinstein, Law and Religion in Israel, 2 Isr. L. Rev. 380, 413 (1967).

[90] Declaration of the State of Israel, supra note 9, at 4.

from membership in the "Jewish people" for whom the State of Israel had been founded. The more general question was whether the Israeli state had a secular or religious conception of Jewishness at its ideological core.

The Zionist Movement, from its founding at the end of the nineteenth century, had been rigorously secular in its orientation. The Jewish religious orthodoxy generally condemned Zionism as false Messianism. This bitter dispute was ended, for practical purposes, by the tragedy of the Holocaust. An uneasy truce was struck between the secular and religious Jews at the moment of Israeli independence; their shared commitment that a new state must come into existence to protect the surviving remnant of the Jewish people transcended disagreements about the exact definition of who comprised that remnant.[91] But now, in the immediate aftermath of the Six Day War, the physical existence of the new state seemed assured; and so the smouldering dispute about whether this state was essentially secular or religious erupted in the *Shalit* case.

The Supreme Court acknowledged the extraordinarily charged character of this case by convening, for the first time in its history, the entire complement of the nine sitting Justices to hear the *Shalit* case. In November 1968, one month after oral argument, the Court took another extraordinary step; it unanimously appealed to the government to amend the registration law to delete the category of *leom* altogether. The government quickly rejected this proposal.[92] The Court then informally decided to delay its decision until after the Knesset general elections in October 1969. Finally, in January 1970, the Court decided the case. A majority of five Justices held that Shalit's claim must prevail because the Registration Officer had not been authorized by the statute to engage in fact-finding regarding the truth of any applicant's declaration regarding *leom* status, unless the declaration was "patently false."[93] The majority thus tried to sidestep the underlying substantive issue of statutory construction. This move was at best awkward in its application to Shalit's claim since the underlying facts regarding his children's status as Jews was clear from the record. Shalit's claim was therefore either patently true or false depending on the substantive definition of *leom* which, however, the majority refused to address.[94]

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91 See the discussion of this historical background in President Agranat's opinion in *Shalit*, 23 P.D.(2) at 587-91, Special Volume Selected Judgments, supra note 36, at 165-68.

92 Justice Landau stated that the Government had rejected the Court's "proposal out of hand." Id. at 520, Special Volume Selected Judgments, supra note 36, at 82.

93 Id.

94 Only one of the majority Justices directly reached the underlying statutory interpreta-

Of the four dissenting Justices, two took the position that the entire issue of defining *leom* was unfit for judicial determination, that it was a "political question" which was beyond the competence of judges to resolve and, in any event, would harmfully embroil the court in highly charged political controversy.[95] The other two dissenters firmly grasped the substantive issue and maintained that the only proper statutory definition of *leom* rested in *Halachic* law.[96] It was a notable fact—not lost on the Israeli public or on the Justices themselves—that these two dissenters, Justices Silberg and Kister, were the only members of the Supreme Court who were observant Jews.[97] The *Shalit* case thus had an impact within the Court similar to its effect in Israeli society generally: it amplified the tensions between secular and religious Jews.[98]

The underlying rationale of the Court's initial unanimous appeal

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tion question: Justice Berinson concluded that *leom* had a secular referent and that the Shalit children qualified as Jews. Id. at 605-08, Special Volume Selected Judgments, supra note 36, at 185-90. Justice Cohen stated that while he did not need to reach the *leom* issue, he would have come to this same conclusion. Id. at 490-91, Special Volume Selected Judgments, supra note 36, at 47-48. The remaining three Justices were silent on the question.

95 Id. at 526-31, Special Volume Selected Judgments, supra note 36, at 89-96 (Landau, J.); Id. at 574, 604, Special Volume Selected Judgments, supra note 36, at 148-49, 185 (Agranat, J.).

96 Id. at 494-503, Special Volume Selected Judgments, supra note 36, at 51-62 (Silberg, J.); Id. at 564, Special Volume Selected Judgments, supra note 36, at 140-41 (Kister, J.).

97 Rubinstein, supra note 88, at 90. Cf. Shetreet, supra note 18, at 41 & n.39:

> [T]he conventions governing the selection of judges of the [Israeli] Supreme Court ensure broad representation of the various ideological streams and social strata. (Thus it has been an established practice to appoint two religious judges to the Supreme Court . . . . Likewise there is a convention that one judge in the Supreme Court should be a Sephardi.)

98 Two Justices noted their resentment at the attempts by religious authorities to influence the Court's deliberation. Justice Landau referred to "manifestations of religious zealotry seeking to impose its will on the whole State, such as the unsuccessful attempt of the Chief Rabbinate to exert pressure on the judges of this court whilst the present petition was still pending." *Shalit*, 23 P.D.(2) at 519, Special Volume Selected Judgments, supra note 36, at 80. Justice Sussman referred obliquely, but unmistakably, to these same rabbinical efforts:

> After completion of the hearings I received letters, some of them on official stationery, with the emblem of the State, amongst them a number sent to my home address by official mail at the expense of the State. . . . I would have refrained from commenting upon such improper attempts at interference with the process of the court, were it not for my amazement that the property of the State and the services of the official mail of a government Ministry are available for the purpose of interfering with judicial proceedings.

Id. at 505, Special Volume Selected Judgments, supra note 36, at 64. As Justice Landau observed,

> The Government rejected our proposal [to amend the statute] . . . and what we feared, has happened. The dispute and the split of opinion have been carried into the precincts of the court. This will do no one any good, but the serious public damage involved is clear for all to see.

Id. at 520, Special Volume Selected Judgments, supra note 36, at 82.

to the government to remove the *leom* category from the registration statute was to avert this consequence. From the Court's perspective, the category itself was a needless provocation for conflict. The political leadership, however, would not or could not step back from this ideological confrontation. Notwithstanding the quick rebuff of their effort to moot the controversy, the Court continued to search for means to resist impaling itself—and, by extension, Israeli society—on one side or the other of this dispute.

This resistance was patent in the opinions of the two dissenting Justices who refused to take any position in the case on the ground that it was a "political question." It was also implicit in the odd non-substantive position taken by the majority. By ignoring the facts that Shalit had set out regarding his children's status, the Court majority in effect ruled that Shalit originally should have had the clear option of discreetly withholding those facts to moot the controversy. In other words, when Shalit originally registered, he should have understood that the Registration Officer would have been obliged to accept his claim if he had not paraded the background facts regarding his wife's status but simply and conclusorily asserted that his children's *leom* was Jewish. The Court majority thus persisted in its appeal for the removal of this provocative *leom* category from the statute. Having lost this appeal for a statutory amendment, the majority directed a similar appeal to each prospective registrant: that any claim for Jewish *leom* status could succeed only if the registrant exercised self-restraint by withholding provocative background facts from the attention of the Registration Officer.

This sustained effort by most of the Justices to dampen conflict was reminiscent of the Court's action seventeen years earlier in the *Rabasiya Villagers* case.[99] That case involved conflict between Arab and Jew, not among Jews; but in that case the Court tried by the same means it attempted in *Shalit* to search for a compromise solution that would transcend the bitterly polarized terms in which the dispute had come into litigation. Recall that the dispute in the *Rabasiya Villagers* case arose because the military had expelled the villagers allegedly on security grounds but had taken no action to occupy or fortify the village. As in *Shalit*, the *Rabasiya Villagers* Court delayed its resolution of the dispute for almost two years while it tried to press the conflicting parties to reach some mutually satisfactory resolution. As in *Shalit*, this effort was unsuccessful. Justice Landau regretfully observed in the *Rabasiya Villagers* case, "The lengthy postponement of the hearing . . . was of no avail in prompting a compromise between the

[99] See supra notes 20-32 and accompanying text.

parties, and the attempt of one of the Judges to summon the parties together and find a common language between them was also of no avail."[100]

There is considerable irony in Landau's depiction of this effort to find a compromise. In 1953, there was no "common language"—even in the rudimentary linguistic sense—between Jew and Arab living in Israel. Even Israeli Jews had hardly reached this goal; modern Hebrew was still relatively undeveloped and fluency in it was not yet widely shared. By 1970, when *Shalit* was decided, the task of finding a common language among Israeli Jews had changed character; now the same words—Who is a "Jew"? What does it mean to say "Israel is a Jewish State"?—were used in different, diametrically opposed ways. With the Israeli triumph in the Six Day War, the quest for common ground for Jews and Arabs had entered a new and ominous phase. Even the competing names for the occupied territory had diametrically opposed implications: was it the West Bank of the Jordan River? or was it Judea and Samaria, the biblical provinces of Eretz-Israel?

As the need for some peaceful reconciliation between these various adversaries became more urgent, the prospects for finding it seemed almost impossibly remote. This concern shone through Justice Landau's observation in *Shalit*, echoing his lament in the *Rabasiya Villagers* case:

> [T]he strength of our democratic system lies in the fact that it enables persons of greatly varying viewpoints to live and struggle together for the things that unite all of them, and first and foremost for the continuing material and spiritual existence of the people. This struggle for existence demands that we should not exacerbate conceptual differences through that zealotry and disputatiousness which has ever characterised our people but that we should persevere in searching for a tolerable *modus vivendi* by way of essential compromise.[101]

Landau then cited the words of a Founding Father, David Ben Gurion:

> "The ability to compromise is a vital condition for the existence of any community, organization or State. . . . The State of Israel needs this faculty many times over, and it must not be hasty in decisions which severely affect the capacity for integrating our returning exiles and for fostering the qualities of cooperation in statehood. . . . There is a certain order of things in history and one must distinguish between the main and the subsidiary, between the per-

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100 Atzlan v. Commander & Military Governor of the Galilee, 9 P.D.(1) 689, 695 (1955).
101 *Shalit*, 23 P.D.(2) at 519, Special Volume Selected Judgments, supra note 36, at 81.

manent and the temporary, between the firm and the changing."[102]

It was clear that Justice Landau, and most of his colleagues on the Supreme Court, viewed the *Shalit* case as evidence that the faculty for compromise was gravely impaired in Israel and that Israeli political leadership had few statesmen prepared to follow Ben Gurion's injunction to differentiate "the main and the subsidiary."[103] What followed from this conviction for the role of the judiciary? Landau himself gave a starkly negative answer in *Shalit*: "What can the court contribute to the solution of an ideological dispute such as this which divides the public? The answer is—nothing, and whoever expects judges to produce a magic formula is merely deluding himself in his naiveté."[104]

Landau's warning was apt enough in the specific context of *Shalit*. The carefully ambiguous compromise crafted by the majority in *Shalit* did not avert an immediately subsequent political explosion. Rapid Knesset action amending the statute to make clear that *leom* status referred to *Halachic* law exacerbated the very tensions between secular and religious Jews that the Court majority had attempted to avoid.[105]

In the years immediately following the *Shalit* decision, the Justices generally remained cautious in their address of politically charged questions. Nonetheless, the basic groundwork was established for a dramatic expansion of the judicial role in Israeli society. The hope that judges might be capable of transcending bitter partisan controversy and of finding a common language for resolving matters of "vital national importance" had been inscribed in the 1968 enactment of the Commissions of Inquiry Law. The Justices' own experi-

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102 Id. (quoting D. Ben Gurion, Netzah Yisrael 157 (1964)).

103 Id.

104 Id. at 519, Special Volume Selected Judgments, supra note 36, at 82.

105 Rubinstein, supra note 89, at 90-91. At the same time, the Knesset amended the Law of Return, providing automatic citizenship to any Jewish immigrant—to extend to spouses and children of Jews. As Amnon Rubinstein observed,

> When one reviews the whole affair, the impression is a mixed one. In the opinion of the present writer the new laws are objectionable as a matter of principle. . . . The Knesset . . . intervened in an ideological dispute and purported to force upon secular Israelis a concept which many reject. . . .
>
> On the other hand, from a practical point of view, the new laws can be considered as a step towards liberalisation. The religious parties got what they wanted on the insignificant issue of registration, but had to yield on the material issue of the Law of Return. This law now applies to many who are not regarded as Jews by religious laws. For the first time in Israel's history, the orthodox monopoly has been broken and non-orthodox conversions, at least abroad, are officially recognised.

Id. at 91 (footnotes omitted).

ence in *Shalit* between 1968 and 1970 underscored the need for someone in Israeli society to assume this role. The government's concession of jurisdiction over military authorities in the occupied territories and the Knesset enactment providing direct, though limited, judicial authority to overturn government security claims reflected the hope that judicial protection of the rule of law might find common values even in the warfare between Jew and Arab.

2. *Bergman v. Minister of Finance*

None of these developments directly expressed a new doctrinal formulation or constitutional principle addressing relations between the Court and executive or legislative authority. Instead, these developments reflected a subtle shift in the underlying assumptions about the desirability and possibility for an active judicial role in Israeli society—assumptions that would in the succeeding two decades increasingly embolden the Justices' conception of their enterprise. Nevertheless, one doctrinal innovation, the Supreme Court's 1969 decision in *Bergman v. Minister of Finance*,[106] symbolized the possibility for direct judicial supervision over legislative enactments. Although this decision is conventionally cited as the closest Israeli counterpart to American judicial review, *Bergman* is actually the least important basis for the Israeli Supreme Court's contemporary claims for increased judicial authority.

In *Bergman*, the Court invalidated a Knesset act providing public financing in election campaigns only for political parties already represented in the Knesset. The Court reasoned that the financing law was inconsistent with a prior Knesset enactment guaranteeing "equal . . . elections."[107] The underlying question was, of course, where the Court found its authority to give binding—in effect, "constitutional"—force to the prior Knesset law.

Prior law was a plausible source for this authority. In 1950, after the Elected Constituent Assembly chose not to promulgate a Constitution and instead transformed itself into the Knesset, a legislative resolution was enacted providing for piecemeal construction of a Constitution by future legislative enactments of "individual chapters [composed] in such a manner that each of them shall constitute a basic law in itself."[108] In succeeding years, several so-called Basic Laws were enacted pursuant to this Resolution and a few provisions

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106 23 P.D.(1) 693 (1969).

107 Id. at 694 (quoting Knesset Election Law).

108 The Harari Resolution, 5 Knesset Protocol 1717, 1743, quoted in Nimmer, supra note 14, at 1220.

in those laws explicitly indicated that they could subsequently be amended only by a specified majority. The provision at issue in *Bergman*, guaranteeing "equal" elections, required an absolute majority of the Knesset.[109]

Though the Knesset thus purported to "entrench" this provision, it did not specify what consequences would follow if a subsequent Knesset acted inconsistently with this entrenchment or what specific role the judiciary should take in this eventuality. As an abstract proposition, the issue whether one legislature has authority to bind its successor has obvious academic interest, and a spirited debate followed in the law reviews.[110] As one commentator concluded, "Would a future Knesset comply with the restrictions? What will the courts do if a future Knesset were to defy them? There are no ready answers to these questions."[111]

The 1969 campaign financing law was enacted by less than an absolute Knesset majority. When Dr. Aaron Bergman challenged it in the Supreme Court, the Attorney General responded that the new law was consistent with the entrenched equality guarantee. The Attorney General, however, did not address the issue of the Court's authority if it reached a contrary substantive conclusion.[112] The Court's resolution was quite odd. It concluded that although the new law was substantively inconsistent with the entrenched provision, it would not "consider . . . the preliminary constitutional questions" regarding its invalidating authority because this would "necessitate a lengthy hearing."[113] The Court stated that such hearing would conflict with the need "for speedy solution" apparently because of the immediate pendency of new Knesset elections.[114] The Court then declared the campaign financing law invalid, but left "open for further consideration" its authority for this action.[115]

After proclaiming this curious result, the Court then suggested how the Knesset might amend the new law "without undue difficulties" to comply with the equality guarantee, and observed that "[i]t is unnecessary to add that in making this suggestion we are very far from any pretension of infringing on the sovereignty of the Knesset as

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109 That is, 61 of 120 members. Section 4, Basic Law: The Knesset, 1959 (13 L.S.I. 228). A different provision of this same law required a higher vote, of eighty Knesset members, for its future amendment. See Likhovski, supra note 3, at 359.

110 See Nimmer, supra note 14, at 1228 & n.63.

111 Likhovski, supra note 3, at 361.

112 Bergman v. Minister of Finance, 23 P.D.(1) 693, 695-96 (1969).

113 Id. at 696.

114 Id.

115 Id.

the legislative branch."[116] The Knesset promptly responded by reenacting the financing law with the amendment proposed by the Court. Was the Knesset, then, acknowledging and ratifying the Court's authority to enforce entrenched provisions of Basic Laws? Or did the imminence of the pending election prompt the Knesset to take the easiest practical response to the judicially engendered confusion while—like the Court—purporting to postpone the fundamental issue of principle for future consideration? The Knesset's resolution was as ambiguous as the Court's.[117]

This ambiguity seemed calculated on both sides to avoid a concession by either court or legislature that final authority rested with the other, while simultaneously averting the harsh confrontation that might ensue if either court or legislature insisted that it was the final authority. In this careful minuet are clear echoes of *Marbury v. Madison*. Chief Justice Marshall did make a more direct claim for some judicial authority to invalidate legislation than Justice Landau (who wrote the sole opinion in *Bergman*), though Marshall was carefully ambiguous about the extent of the judicial authority he claimed. Notwithstanding this difference, there was a more important similarity in both courts' efforts to shape their opinions to challenge the other branches while at the same time depriving those branches of any direct opportunity to disagree with the courts' authority to issue that challenge.

Thus Marshall was openly critical of the Jefferson administration's disregard for "legality" in withholding Marbury's commission; yet he disclaimed any authority to order delivery of the commission.[118] Justice Landau was critical of the Knesset's disregard for the norm of equality while avoiding any direct assertion that his court "had any pretension of infringing on the legislative sovereignty of the Knesset."[119] The two Courts both claimed and disclaimed extensive authority in the very same gesture—Marshall by asserting authority to invalidate a congressional act to avoid the necessity of invalidating a presidential act, and Landau by ruling that the Knesset act was in-

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116 Id. at 700.

117 In addition to amending the campaign financing law as the Court had suggested, the Knesset enacted the following resolution by an absolute majority: "For the purpose of removing doubt it is hereby laid down that the provisions contained in the Knesset Election Laws are from the date of their coming into effect valid for every legal proceeding and for every matter and purpose." Elections (Ratification of Validity of Laws) Law, 1969, 568 Sefer Hahukim (Primary Legislation) 269 (1969). See Shapira, supra note 15, at 413-14.

118 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154-62, 168-80 (1803).

119 Bergman v. Minister of Finance, 23(1) P.D. 693, 700 (1969).

valid while avoiding any direct claim that the Court had authority to make this ruling.

Moreover, both Courts were able to reach this confounding result only by an almost egregious disregard for conventional standards of judicial reasoning. Marshall's guilt on this score was in his barely plausible reading of the Judiciary Act, his partial and misleading quotation of the portion of Article III on which he relied to invalidate the Judiciary Act provision as he had [mis]read it, and his willful disregard for past precedents that would undermine his readings of both the Judiciary Act and the Constitution.[120] These flaws were not apparent on the face of Marshall's opinion; they were indeed artfully concealed by Marshall's considerable rhetorical skill. The equivalent flaw in *Bergman* was the strange claim that the Court could invalidate the Knesset law without considering its authority to do so. This illogic at least had the virtue of being apparent—and virtually avowed as such—in the Court's decision. Immediately after *Bergman*, one American commentator drew an unfavorable comparison with *Marbury*, claiming greater "depth of analysis . . . [and] judicial craftsmanship" for John Marshall.[121] Equal craft was displayed, however, by both Courts in a more fundamental way.

Since *Bergman*, the Israeli Court has invalidated two subsequent Knesset election-related laws on the basis of their inconsistency with the entrenched provision at issue in *Bergman*.[122] In both cases, the Court again refrained from considering its authority for this action. But this restraint was embellished by a new step in its continuing dance with the other branches. In both cases, the Attorney General declined to challenge the Court's authority but nonetheless explicitly "retain[ed] the right to raise these and similar questions in future cases."[123] In the most recent case, decided in 1982, Justice Shlomo Levine laconically observed, "It should be noted parenthetically that the greater the number of cases in which the court shall address the merits of petitions that raise such constitutional issues, the lesser chance that this court will decline to consider them even if the Attorney General decides in the future to raise 'these and similar questions.' "[124] It seems, then, that judicial authority to invalidate Knesset laws on the basis of prior "entrenched" laws is close to an

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120 See Bloch & Marcus, John Marshall's Selective Use of History in *Marbury v. Madison*, 1986 Wis. L. Rev. 301; Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1.

121 Nimmer, supra note 14, at 1218.

122 See infra note 250.

123 Rubinstein v. Chairman of Knesset, 37 P.D.(3) 141, 147 (1983).

124 Id. at 147-48.

entrenched feature in Israeli jurisprudence. The Knesset has, however, enacted only a few such entrenched provisions in any Basic Law.[125] The Court's willingness to enforce such entrenchment has not yet led the Knesset to any extensive embrace of this technique for self-regulation.

3. *Bergman* and *Marbury*

In some far distant time, *Bergman* may well appear in the same retrospective light as *Marbury*—as the case that established the fundamental and important judicial authority to invalidate legislative enactments. *Bergman* does not yet have the same clear status as *Marbury* and certainly does not have the same importance. But when *Marbury* itself was decided, it did not have the clarity and importance that it has by now assumed. *Marbury*'s authority grew in response to events in American political and social life that repeatedly and with increasing urgency posed a question—a question whose answer John Marshall had insisted in *Marbury* was the special "province and duty" of the judiciary.[126]

The question was, simply phrased, what is the source of political obligation and loyalty in a divided polity? Marshall's answer in *Marbury* was the rule of law, interpreted and enforced by courts. This was the basis for his claim both that a judicial remedy against the Executive was warranted to vindicate Marbury's statutory right to delivery of his commission[127] and that the Court would enforce the law of the Constitution against Congress to overturn its authorization of original Supreme Court jurisdiction in mandamus actions.[128] Whatever the technical justifications for Marshall's answer, the background facts of the dispute demonstrate that this was the immediate and urgent question for him.

The refusal of the newly elected Jefferson Administration to deliver Marbury's commission was widely understood as a continuation of the sharp partisan conflict surrounding the 1800 election—a conflict that raised troubling questions for all participants about the con-

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125 See Shapira, supra note 15, at 416.

126 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

127 The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 163.

128 "It is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution." Id. at 177.

tinued viability of the Union.[129] In retrospect, this fear may seem disproportionate and difficult to credit. At the time, however, neither Marshall nor his contemporaries had a conception of politics that could justify the partisan conflict that had just culminated in Jefferson's election—the dramatic and bitter rise of factional dispute following George Washington's first term, the Federalists' efforts during Adams's term to annihilate their opponents (most notably in the Alien and Sedition Acts), and the Republican electoral victory which appeared to augur retaliatory inflictions on the defeated Federalists.[130] This kind of partisan conflict was almost universally viewed as an anathema—the "violence of faction," as Madison had put it in Federalist Paper Number 10.[131] Marshall's opinion in *Marbury* offered a vision of the judicial role that could transcend "faction."

For Israel, the Six Day War framed the cautious and ambiguous development of the doctrine of judicial review in the *Bergman* case in the same way that the partisan conflict culminating in Jefferson's election set the framework for *Marbury*. The most important and most direct jurisprudential response to the Six Day War, however, was not *Bergman*; it was the Israeli Supreme Court's assumption of jurisdiction over the occupying military authorities. The Knesset had, and still retains, clear formal authority to withdraw this jurisdiction from the Court; but the background inhibitions on the Knesset's exercise of

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129 The election of 1800 seemed to be the beginning of the fulfillment of . . . fear [of internal disorder and anarchy]. The campaign had been an exceptionally bitter one, marked by considerable vilification on both sides, and the polarization of parties. Jefferson's victory over Adams, by a mere eight electoral votes, had not been overwhelming; in seven of the sixteen states he did not poll a single electoral vote, a fact which greatly disturbed [Jefferson], for he had predicted that "should the whole body of New England continue in opposition to these principles of government . . . our government will be a very uneasy one." Tension had increased even more during the anxious weeks that passed before the tie between Burr and Jefferson was finally broken. During this time plots and counterplots, with both sides seriously considering the use of force, embroiled the country.

. . . .

. . . In March [1801 Jefferson] had claimed that with few exceptions, no removals [from federal office] were to be made simply for a difference of political opinion, but by July he was asserting that, if necessary, in order to give Republicans their share of the political spoils, Federalists [should] be dismissed on political grounds. . . .

To the Federalists, the President's [position] was the signal for the beginning of a systematic course of persecution and revenge.

R. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 28, 38-39 (1970) (citations omitted).

130 See generally R. Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840, at 74-140 (1970) (tracing the development of Jeffersonian opposition to the Federalists and the successful transfer of power after the 1800 election).

131 The Federalist No. 10, at 77 (J. Madison) (New Am. Library ed. 1961).

this authority illuminate further parallels with the American experience in *Marbury*.

4. Jurisdiction over the Territories and *Marbury*

The intense divisiveness in Israeli politics caused by the status of the territories occupied in the 1967 War ironically served to insulate from parliamentary override both Meir Shamgar's decision to concede jurisdiction and the Court's willingness to accept that concession. The political Right claimed that the territories were an intrinsic part of *Eretz Israel*, the Land of Israel by biblical entitlement. The Left claimed that the territories were held only by military force of arms, and some portion of the territories might ultimately be annexed to the Israeli state while other portions might be ceded as part of a peace agreement with Arab neighbors. Each of these political positions carries paradoxical internal contradictions regarding the issue of Supreme Court jurisdiction. The Right would prefer that the Court take the same jurisdiction over the territories as it does over all of Israel, except that the Court must not exercise this jurisdiction to diminish the prospects for future hegemony or the current tight military control and the subordinated status of the Arab population in the territories. The Left would prefer that the territories remain in an anomalous legal status clearly outside Israeli domestic jurisdiction, except that the Left opposes vesting unsupervised jurisdiction in the military over the territories in a way that would ultimately bar any future cessions, or over the Arab residents in a way that would jeopardize any future possibility of harmonious relations.

It is not clear whether Shamgar charted his position, or whether the Supreme Court designed its response to his position, with direct reference to this paradoxical political context. Whether calculated or not, the jurisdiction conceded by Shamgar and assumed by the Court was desired in principle (but feared in practice) by the Right and was desired in practice (but feared in principle) by the Left. As in John Marshall's tour de force in *Marbury*, the political forces on all sides opposed the result reached by the Israeli Supreme Court, but none was able to contradict it.

As in *Marbury*, moreover, the political adroitness of the Israeli Supreme Court's assumption of jurisdiction would not have had long range significance if it had not touched some deeper chord—some underlying inchoate belief that the task identified by the Court was socially necessary and best performed by judges. Thus the 1967 Six Day War and resulting military occupation had the same underlying implication for Israeli society that the partisan struggle and resulting Re-

publican electoral victory had in 1800 for American society: Both events raised serious doubts about whether the divisions were so sharp among a populace ostensibly subject to a common government that brute force was the only possible source of unified governmental authority.

This proposition may seem self-evident for relations between Israelis and Arabs in the occupied territories. But the assumption underlying Shamgar's concession of Supreme Court jurisdiction was that avowed commitment to the rule of law, exemplified by the rule of judges, could over time provide some common bond transcending mere brute force. On the American side, in retrospect it may seem improbable that Jefferson's election also signified a rule of brute force; for large numbers of people at the time, however, this was its connotation. The Federalists saw their victorious opponents as dangerous Jacobins (Hamilton even briefly contemplated a plot to reverse Jefferson's electoral victory in New York[132]); and the Republicans saw their defeated opponents as intent on restoring monarchic rule (Jefferson himself called his election the "Second American Revolution"[133]). As I noted earlier, this post-colonial generation saw "violence" and "evil" in factional disputes that for us today seem relatively mild and, in any event, beneficial instances of "politics as usual." John Marshall's explicit claim in *Marbury* to speak on behalf of the rule of law thus addressed the same social concerns as Meir Shamgar's proclaimed faith in the meliorative role for judicial review of military authority in the occupied territory.

It may be, as Justice Landau suggested in *Shalit*, a naive delusion to look toward courts for this role, to "expect[ ] judges to produce a magic formula" that would solve intense disputes.[134] On this proposition, however, Landau was a dissenter in *Shalit*. For other Israeli Justices, and particularly for those who came to the Court later, the tools were at hand, the need appeared urgent, and other institutions seemed incapable of addressing the task.[135]

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132 In a letter to John Jay outlining his plan, Hamilton observed, "[I]n times like these in which we live, it will not do to be over-scrupulous. . . . [O]rdinary rules [ought not hinder steps] to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of state." G. Stourzh, Alexander Hamilton and the Idea of Republican Government 32-33 (1970).

133 R. Wiebe, The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion 110 (1985).

134 Shalit v. Minister of the Interior, 23 P.D.(2) 477, 520 (1970), Special Volume Selected Judgments, supra note 36, at 82-83.

135 Among the more recently appointed Justices, Meir Shamgar (who joined the Court in 1975) and Aharon Barak (who joined in 1978) have been particularly outspoken and influential advocates for judicial activism. Unlike the other Justices, each had previously served as Attor-

II. THE SECOND GENERATION: THE AMERICAN WAY

A. *The Definitive Emergence of Judicial Review in America*

The underlying question that Marshall addressed in *Marbury v. Madison*—the source of binding loyalty in a divided society—appeared to abate in the decade or so thereafter; it did not, however, vanish from American political life. The question suddenly reappeared in the 1820s and, in the succeeding decades, became crystallized into the sectional division between the "free" North and the "slave" South.[136] During all of this time, Marshall's answer to the problem of factional conflict took on greater appeal. The Supreme Court's decision in *Dred Scott*[137] must be understood in this context. It was the first direct application of the authority claimed in *Marbury* for judicial review of congressional acts.

The same considerations evident in the background of the Israeli Supreme Court's actions around 1967 dominated the deliberations of the United States Supreme Court in 1857 when it decided *Dred Scott*. American political institutions patently seemed incapable of resolving the long-simmering issues regarding territorial slavery. Political compromise seemed impossible and yet, without some compromise, the existence of the Union appeared endangered. Indeed, the only political agreement that had taken hold by the mid-1850s was that the Supreme Court should address these issues and somehow find (in Justice Landau's evocative words) a "magic formula" that had thus far eluded all of the political actors. The Missouri Compromise of 1820, demarking a geographic line for the permissable limits of slavery in the territories, was no longer acceptable either to the Northern opponents or the Southern proponents of slave status. In 1854 Congress repealed this act, proclaiming instead that each territorial legislature had as much authority to regulate slavery as Congress could constitutionally vest and further providing that the Supreme Court should decide this constitutional question.[138] In his 1857 Inaugural Address, President James Buchanan urged the Court to "speedily and finally

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ney General—a distinction to which some attribute both their willingness to override executive and legislative officials and their influence on their judicial colleagues. While both men clearly have impressive intellectual capacities and experiential credentials, it appears more likely that their own commitment to an active judicial role and their persuasiveness within the Court are derived more from the impact of general social imperatives than from their idiosyncratic personal traits.

136 See R. Wiebe, supra note 133, at 213-16.

137 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

138 The Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854). One Senator observed that Congress had enacted a lawsuit, not a law. See Burt, What Was Wrong with *Dred Scott*, What's Right about *Brown*, 42 Wash. & Lee L. Rev. 1, 15 (1985).

settle" this question.[139] Thus, like the Israeli Supreme Court in its acceptance of jurisdiction over the occupied territories, the United States Supreme Court was not aggrandizing its own role; in attempting to transcend factional conflict by the assertion of judicial authority, the Court was responding to the urgent importunings of others.[140]

Dred Scott failed in this conflict-transcending attempt. But the underlying question of the source of binding loyalty not only persisted; it exploded into Civil War. From this ferocious War, a clear answer did emerge: The basis for political obligation and loyalty in America was force. But this is an uncomfortable answer, certainly for long-term relations.[141] At first tentatively, and then with increasing adamance, the Supreme Court advanced and others accepted *Marbury*'s claim for a central judicial role as an alternative to civil warfare in settling partisan conflict.

Constitutional theorists have persistently complained that this judicial authority is ultimately no different from brute imposition of force, and less justifiable than political obligation based on majority rule. Democratic majoritarianism is, however, an unconvincing answer to the problem of forced allegiance. No matter how peaceable the voting process might appear, its binding status is still based on the sufficient number of arms raised to overwhelm a lesser massed force. The authority of elected officials thus rests on force, albeit numerical force.

This underlying implication of democratic majoritarianism is only painfully obvious at times of deeply polarized dispute. If stark resort to force is to be averted at those times, some binding source of authority must be found that surpasses or transcends political struggle. Before the Civil War in America, the disembodied idea of Union was invoked but it proved insufficient. Following the War, as *Marbury* had originally suggested, the idea of transcendant loyalty and

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139 J. Buchanan, Inaugural Address, in 6 A Compilation of the Messages and Papers of the Presidents 2962 (J. D. Richardson ed. 1903).

140 As Justice Wayne observed, in a concurring opinion, "[T]he Court neither sought nor made [this] case. . . . [T]he peace and harmony of the country required . . . judicial decision." 60 U.S. at 454-55.

141 Thus Lincoln maintained in his inaugural appeal to the South against secession:

> A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face, and intercourse, either amicable or hostile, must continue between them. . . . Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions as to terms of intercourse are again upon you.

A. Lincoln, First Inaugural Address, Mar. 4, 1861, 5 Writings of Abraham Lincoln 263-64 (A. Lapsley ed. 1906).

obligation was embodied in the Supreme Court, in its life-tenured Justices who stood "outside" politics and stood for the Constitution. This embodiment did not come from the constitutional text or from the logical force of John Marshall's reasoning, but rather from the experience of, and feared repetition of, violent civil conflict.

In American jurisprudence, moreover, the modern conception of judicial review was more directly established in *Dred Scott* than in *Marbury*. This genealogy is not customarily acknowledged; it would be similar to admitting a horse thief in an aristocratic family tree. We should acknowledge the existence of this shady ancestor, however, to reveal the central truth at the foundation of the family fortune: that deep-riven ideological disputes in a democratic society provide the impetus for the development of the institution of judicial review.

Dred Scott was not only the first Supreme Court invalidation of a congressional act since *Marbury*; it was also a bolder claim for judicial review than *Marbury*, both in doctrinal and political terms. Regarding doctrine, the act invalidated in *Marbury* had vested jurisdiction in the Court that, according to Marshall, was forbidden by the Constitution. Thus Marshall could base his claim for judicial review authority simply on a principle of institutional self-protection, the premise that Congress had directly commanded the Court to act in contravention of the Constitution. Marshall did rely on this principle but with his characteristic masterful ambiguity he did not disclaim the possibility of more extensive judicial review authority.[142] *Dred Scott* seized the doctrinal opportunity that Marshall lightly sketched.

As for the politics of the two decisions, virtually no one cared about the congressional act, regarding Supreme Court original jurisdiction, invalidated in *Marbury*. The invalidation was incidental to the Court's avoidance of direct confrontation with the Executive Branch on the politically contentious issue at the heart of the case—whether Marbury should receive his commission. In *Dred Scott*, by sharp contrast, the Court grasped the political nettle more firmly than the case required; there were many respectable opportunities in the case for a narrower disposition, but the Court eschewed them all to rule that blacks, whether free or slave, could not be citizens of the United States and that the Missouri Compromise of 1820 was unconstitutional.

The consequence of the *Dred Scott* decision was morally and politically disastrous. The Court identified racism and the maintenance of black slavery not simply as a regrettable feature of the American

142 See infra text accompanying notes 288-98.

constitutional regime but as its proudly avowed cornerstone. In its political impact, the decision most likely hastened the eruption of civil war by hardening the polarized lines of north-south conflict.[143] Northern opponents of slavery passionately criticized the Court, and they took control of the presidency and Congress at the national election immediately following the decision.

During the 1860s, the newly regnant Republicans did move against the Court, in apparent retaliation for its *Dred Scott* apostasy, in two ways: by manipulating its size[144] and by limiting its jurisdiction.[145] These two points of Supreme Court vulnerability are so obvious that, in themselves, they cast doubt on the seriousness of the founders' intentions that the Justices would serve as the "faithful guardians of the Constitution."[146] Even if the founders did intend this role for the Court, these vulnerabilities indicate that they did not give much thought—beyond the modest protection afforded by life tenure for individual judges—to possible means of arming the guardians against political assaults.

The opponents of *Dred Scott* were not the first politicians to discover or capitalize on these judicial vulnerabilities. Thomas Jefferson's Republicans invoked these weapons, and judicial impeachment as well, as major elements in their political program immediately after the 1800 elections.[147] Indeed, dispute about the institutional role of the Supreme Court was interwoven into the political debate about the Alien and Sedition Acts of 1798—a debate that was central to the

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143 See S. Kutler, The *Dred Scott* Decision: Law or Politics xvii (1967); D. Potter, The Impending Crisis 1848-1861, at 291-93 (1976).

144 In 1863, Congress added a tenth Justice to the Court to enable President Lincoln to assure a northern majority. In 1866, Congress reduced the Court to seven members, effectively depriving President Johnson of any opportunity to appoint new Justices and solidifying the northern dominance on the Court. (Historians dispute whether retaliation against Johnson or manipulating the judicial circuits to assure northern dominance was the dominant motive in the congressional action; compare C. Warren, 2 The Supreme Court in United States History 421-22 (1928) (attributing the reduction to Congress' distrust of both the President and the Court) with S. Kutler, Judicial Power and Reconstruction Politics 60-62 (1968) (attributing the reduction to the Republican-ruled Congress' desire to reduce what was viewed as an undue and disproportionate southern influence in national politics).) In 1869, at Grant's election, the Court was restored to nine members. See G. Stone, Constitutional Law lxxi (1986).

145 See *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

146 The phrase is Alexander Hamilton's in The Federalist No. 78, at 470 (A. Hamilton) (New Amer. Library ed. 1961).

147 For the measures assayed and implemented during the Jefferson administration, see R. Ellis, supra note 129, at 36-107. Life tenure for inferior federal judges proved a feeble protection when Congress abolished the appeals court to which sixteen federal judges had been appointed by the outgoing Adams Administration. Although these judges' life tenure remained apparently intact, they no longer had any jurisdiction in which they might wield their authority. John Marshall's Court unanimously upheld the constitutionality of this action. Stuart v. Laird, 5 U.S. (1 Cranch) 298 (1803).

1800 election campaign. To fully understand the significance of *Dred Scott* and its aftermath in the development of American judicial review, we must step back briefly to examine the terms of the dispute surrounding the Alien and Sedition Acts.

In 1798, both the Kentucky and Virginia legislatures challenged the constitutionality of these Acts, in resolutions drafted respectively by Thomas Jefferson and James Madison. Jefferson's Kentucky Resolution explicitly rejected any dispositive role for the Supreme Court in adjudicating the constitutionality of congressional acts, and instead claimed this role for state legislatures.[148] Madison's Virginia Resolution was more circumspect and ambiguous about this claim.[149] Many of Jefferson's supporters interpreted their 1800 electoral victory as an endorsement of the constitutional theory of the Kentucky Resolution; this was the ideological underpinning of the assault they immediately launched against the Court.[150]

John Marshall's ruling in *Marbury* did not settle this issue; it was only an inconclusive volley in an ongoing battle, as the cautious com-

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148 The Kentucky Resolution recited:

> [T]hat whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact [the Constitution] each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress.

Section I, Ky. Res. of 1798, Ky. Acts, 1st Sess., 7th General Assembly.

149 The Virginia Resolution appears to echo Kentucky at its outset: "In case of a deliberate, palpable, and dangerous exercise of . . . powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil." Virginia Res. of 1798, 2 Va. Stat. 192-93. At its end, however, though the Resolution "declared" that the Alien and Sedition Acts were "unconstitutional," it did not follow Kentucky in holding the acts "void and of no force," but merely invited other states to take "the necessary and proper means . . . for co-operating with this state, in maintaining the authorities, rights, and liberties, reserved to the states respectively, or to the people." Id.

150 [T]hrough the adoption of the Virginia and especially the Kentucky resolutions, the Republican party appeared to imply that it now favored changes in the Constitution which would restore the balance of power to the states. Often referred to as the "Spirit of 1798," this open and deliberate embracing of the Anti-Federalist point of view by many people who had supported the adoption of the Constitution contributed significantly to Jefferson's election in 1800.

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[However,] it was by no means clear what Jefferson's victory in 1800 signified. Some Republicans expected it to mean a thorough overhauling of the Constitution and a change in the administration of the national government in a democratic, agrarian, states' rights direction. Others, viewing themselves as protectors of the constitutional settlement of 1788, hoped it would only mean changes in the area of foreign policy and in some of the government's personnel.

bination of force and ambiguous indirection in his opinion indicates. Marshall tried to settle this issue by a bolder frontal assault sixteen years later in *McCulloch v. Maryland*,[151] going out of his way to debunk the so-called "compact theory" on which both the Kentucky and Virginia Resolutions based their claims for the constitutional interpretive authority of state legislatures.[152]

In conventional accounts of constitutional history, *McCulloch* is the end of the matter: a unanimous decision by the Supreme Court, supported by logic ("consider the chaos if each state legislature could invalidate a congressional act"[153]) and by the clear original intent of the founders ("they spoke for the 'We the People', not 'We the States' "[154])—all set out in an eloquent opinion by the great John Marshall. In practical political terms, however, *McCulloch* did not end the claim for state legislative authority and its corresponding derogation of Supreme Court authority as a serious subject of American constitutional debate.[155]

This claim for state legislative authority was at the center of the

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. . . To many of the more moderate members of the party the "Spirit of 1798" was at best a necessary evil, a means to the end of saving the country from High Federalist extremism. . . . For the moderates, the meaning of Jeffersonian democracy is to be found in Jefferson's inaugural address and in his policy of conciliating his political enemies and harmonizing the different interests in the country. There were other Republicans, however, who viewed Jefferson's election as a divinely-inspired event and who did wish to see the principles of the "Spirit of 1798" put into practice.

R. Ellis, supra note 129, at 274-75.

151 17 U.S. (4 Wheat.) 316 (1819).

152 Id.

153 But consider John Calhoun's prescient response that unless states had an effective means to resist unconstitutional impositions (from their perspective), they would secede. Thus, Calhoun argued, the Supreme Court's claim for final authority would ultimately foment rather than forestall chaos. See J. Calhoun, A Disquisition on Government and a Discourse on the Constitution and Government of the United States 268-69 (R. Cralle ed. 1854).

154 See 1 J. Story, Commentaries on the Constitution of the United States 244-47 (3d ed. 1858).

155 Judge Spencer Roane of the Virginia Supreme Court, in a pseudonymous newspaper attack on *McCulloch*, explicitly based his criticism on the principles of the Virginia Resolution, indicating its persistent ideological significance: "It [the Resolution] has often been called by an eloquent statesman [John Randolph] his political bible. . . . It was the Magna Carta on which the republicans settled down, after the great struggle in the year 1799. Its principles have only been departed from since by turn-coats and apostates." John Marshall's Defense of *McCulloch v. Maryland* 113 (G. Gunther ed. 1969). Judge William Brockenbrough of Virginia, in his newspaper critique of *McCulloch*, similarly relied on the premises of the Resolution: "[There is] no tribunal superior to the authority of the parties [so that] the parties themselves must be the rightful judges in the last resort [regarding the constitutionality of congressional acts]." Id. at 61. See Powell, supra note 1, at 934-35 ("With remarkable speed, the constitutional theory of the Virginia and Kentucky Resolutions established itself as American political orthodoxy. . . . Acceptance of the compact theory . . . spread throughout the

Nullification Crisis of 1828-32 when the South Carolina legislature declared the constitutional invalidity of a congressional act. This Crisis ended inconclusively, with both sides backing away from open confrontation and neither side admitting practical or ideological defeat.[156] John Calhoun, who drafted the South Carolina act while serving as Vice President, justified nullification on the constitutional theory of the Kentucky and Virginia Resolutions.[157] He adhered to this theory in his *Discourse on the Constitution and Government of the United States*, published almost twenty years later.[158] For Calhoun, and for many others at the time, the Kentucky and Virginia Resolutions and their ratification in the "Revolution of 1800" effectively revised the monarchical Federalists' misreading of the Constitution—a heresy perpetuated in *McCulloch* by John Marshall, the Federalist Chief Justice.

In retrospect, it appears *McCulloch* carried the day and Calhoun was merely a partisan spokesman for a defeated and disreputable minority view. At the time, however, *McCulloch* was widely viewed as little more than a partisan claim by the judiciary for its authoritative role in determining the respective constitutional boundaries of state and national authority. The ultimate success of this claim rested less on the constitutional text, or the force of John Marshall's ratiocination, than on the practical force of his prefatory observation in *McCulloch*:

> [T]he conflicting powers of the government of the Union and of its members, as marked in [the] constitution . . . must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made.[159]

Marshall's anticipation "of hostility of a still more serious nature" may have seemed overblown in 1819, in the flush of national unity known as the Era of Good Feelings and just a year before James Monroe was reelected president by a unanimous vote of the Electoral College.[160] The events, however, of the following decades—the growing sectional tensions encapsulated first in the Nullification Crisis and then expressed in the increasingly bitter dispute over territorial slav-

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country and, beyond the confines of John Marshall's Supreme Court, stood virtually unquestioned until the nullification crisis of 1828 through 1832.").

156 See R. Ellis, The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis 170-77 (1987).

157 Id. at 7-9.

158 J. Calhoun, supra note 153, at 268-69.

159 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-01 (1819).

160 See R. Hofstadter, supra note 130, at 194-200.

ery—gave credence to Marshall's concerns and practical weight to the judicial role that he conceived as the answer to these concerns. By the time of *Dred Scott*, these concerns and the corresponding attractiveness of this dispositive judicial role were at peak intensity. A majority in Congress, and President Buchanan in his Inaugural Address in 1857, explicitly invited the Court to settle the territorial slavery issue.[161] One of the concurring Justices in *Dred Scott* directly echoed John Marshall's preface in *McCulloch*: "The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision."[162]

Notwithstanding this pretension, *Dred Scott* did not settle the territorial slavery issue. Nor did the decision definitively resolve the questions that had persisted from the "Revolution of 1800" about the constitutional basis for judicial review. By 1857 these questions were no longer advanced by proslavery partisans like Calhoun; they were instead pressed by antislavery northerners. At the very moment that *Dred Scott* was decided, the Wisconsin Supreme Court had embraced the constitutional argument of Jefferson's Kentucky Resolution, holding that the United States Supreme Court was not the final adjudicator of the constitutionality of congressional acts.[163] In this case, the Wisconsin court ruled that the Fugitive Slave Act of 1850 was unconstitutional and ordered the release from federal custody of an abolitionist convicted of assisting a slave's escape. In 1859, two years after its *Dred Scott* decision, the Supreme Court unanimously overturned the Wisconsin court's action, resoundingly affirming "the power of this court to decide, ultimately and finally," the constitutionality of congressional acts.[164] The Court, moreover, made clear that its authority stood above both Congress and the states to avert "force and

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161 See supra text accompanying notes 138-39.

162 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 454-55 (1856) (Wayne, J., concurring).

163 The Wisconsin Court's position was most extensively explained in Justice A.D. Smith's opinion:

> I [do not] yield to the doctrine early broached, but as early repudiated, that any one department of the government is constituted the final and exclusive judge of its own delegated powers. No such tribunal has been erected by the fundamental law. The judicial department of the federal government is the creature by compact of the several States, as sovereignties, and their respective people. . . . To admit that the federal judiciary is the sole and exclusive judge of its own powers, and the extent of the authority delegated, is virtually to admit that the same unlimited power may be exercised by every other department of the general government.

In re Booth, 3 Wis. 1, 23-24 (1854).

164 Ableman v. Booth, 62 U.S. (21 How.) 506, 525 (1858).

violence"[165] between federal and state authorities. Without such a "calm and deliberate arbiter," the Court warned, "revolutions by force of arms" would inevitably result.[166]

This warning did not, however, silence the critics of the Court's judicial review authority. These critics, moreover, were not marginal participants in the political process; the most prominent was the newly elected President, Abraham Lincoln. In his 1861 Inaugural Address, with revolutionary force looming, Lincoln denounced the Court's claim to final adjudicative authority:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. . . . [But] if the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[167]

Lincoln's attack was more guarded than the Wisconsin Supreme Court's; he played Madison of the Virginia Resolution to the Wisconsin's court's Jefferson of the Kentucky Resolution.[168] Lincoln's criticism of the principle of judicial review was nonetheless more direct and outspoken than any subsequent president (though many of them have criticized specific Supreme Court decisions[169]). This un-

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165 Id. at 519.

166 This is the full passage from the Court's opinion:

> [A]s the final appellate power in all such questions [regarding the constitutionality of congressional acts] is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided . . . internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our Government, State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

Id. at 520-21.

167 A. Lincoln, First Inaugural Address, supra note 141, at 262.

168 Lincoln's position was a direct application of his hostility to *Dred Scott*; he had "apparently [given] no thought to the operative meaning of judicial review until the Dred Scott decision compelled him to do so." D. Fehrenbacher, Lincoln in Text and Context 20 (1987).

169 In 1935 Franklin D. Roosevelt drafted a speech quoting Lincoln's attack on the principle of judicial review. Roosevelt intended to deliver the speech if the Supreme Court overturned the New Deal law abrogating the "gold clause" in federal obligations, but the Court

repentant stance among reputable political leaders with widespread followings, opposing the Court's assertion of judicial review authority, demonstrates that even at the time of *Dred Scott* this authority had not been unquestionably established as a centerpiece of our constitutional regime.[170]

The Court's judicial review authority was firmly settled only by the enactment of the fourteenth amendment in 1868. The amendment moved the Court into a pivotal role as enforcer of the equality guarantee against hostile actions either by the national or state governments. Moreover, the fourteenth amendment was a more direct limitation on state governmental power than had previously appeared in the Constitution. The most important prior constitutional limits on state authority had been implicit in the grants of superceding legislative powers to Congress.[171] The Court in *McCulloch* claimed authority to police the limits of these congressional powers to protect state prerogatives. But this claimed authority was carefully and even parsimoni-

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upheld the law in Perry v. United States, 294 U.S. 330 (1935). Though Roosevelt was the most direct of modern Presidents in contesting the Court, in his public pronouncements even he was careful. Most notably, in the disingenuous rationale he offered for his court-packing plan, he avoided a direct assault on the Court's ultimate authority to interpret the Constitution. See generally G. Gunther, Constitutional Law 30-31 (10th ed. 1980) (presidential challenges to the Court).

[170] In the United States . . . the locus of sovereign political authority remained vague, ill-defined, and ultimately unresolved. . . . [E]ven the doctrine of judicial review remained disputed, and as a consequence the first half of the nineteenth century witnessed a continual struggle between nationalism and federalism, between the idea that sovereignty lies with the central government and the idea that the states have the final right to judge constitutionality of congressional legislation. . . . [There were] protracted dispute[s] through the issues involving the alien and sedition acts, banking, embargoes, tariffs, territorial expansion, and, most explosively, slavery. . . . Ultimately, the idea of sovereign political authority in America was decided not by political ideas mediated by language and rhetoric or even by ballots and election results. . . . [I]t was decided on the bloody battlefields of the Civil War.

J.P. Diggins, supra note 15, at 133.

[171] The Constitution did provide some direct constraints on state conduct, such as the prohibition against ex post facto laws or impairments on the "obligation of contracts" and the Court did strike down state laws under such provisions. See, e.g., Dartmouth College v. Woodward, 7 U.S. (4 Wheat.) 518 (1819) (invalidating state legislative modification of college charter); Sturges v. Crowninshield, 7 U.S. (4 Wheat.) 122 (1819) (invalidating state retroactive insolvency law). Moreover, Article IV, section 2 of the Constitution explicitly provided that "Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. But this provision was not a source for any substantial exercise of judicial authority over state laws before the Civil War; and this same language, essentially reiterated in the fourteenth amendment, was disclaimed by the Court soon after the War as a basis for substantial authority. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

ously limited,[172] and was not exercised until *Dred Scott*. Before the fourteenth amendment, the Court had frequently acted to limit state authority; but most of these judicial actions were taken as the agent for congressional authority either to rebuff state disregard for explicit congressional directives or to keep states from acting in some exclusive congressional preserve.[173] For the most part, the Court purported to serve congressional purposes rather than to impose limits on state government based on its independent and unreviewable interpretation of constitutional norms.

The fourteenth amendment was unique, however, in the directness of its reliance on the Supreme Court to enforce limits on both the state and national governments. The framers of the fourteenth amendment enacted this exalted umpireal role—thereby settling the question in favor of the prior claims for judicial authority—because the traumatic experience of the Civil War had confirmed the grim warnings that this judicial role was the only institutional means for averting "hostility of a still more serious nature"[174] or of repeated "revolutions by force of arms."[175]

The victorious Republicans did not immediately embrace judicial authority in the wake of the War. The thirteenth amendment abolishing slavery referred only to, and thus appeared to rely exclusively on, congressional enforcement of its terms.[176] The first draft of the fourteenth amendment explicitly gave Congress "power to . . . secure to all persons in the several States equal protection in the rights of life, liberty and property."[177] This draft provision said nothing about the judiciary; it even appeared to exclude any judicial review of congressional actions.[178] The House did not act on this first draft, however;

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172 Proponents of state prerogatives criticized Marshall's opinion in *Marbury* as an endorsement of essentially unlimited federal legislative authority; see Gunther, supra note 49, at 33-35.

173 See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (upholding Fugitive Slave Act of 1793 against state restrictions); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (upholding congressional regulation of coastal shipping against state restrictions); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding Bank of United States Act against state legislative challenge); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (upholding section 25 of the Judiciary Act against state court challenge).

174 *McCulloch*, 17 U.S. (4 Wheat.) at 401 (Marshall, C.J.).

175 Ableman v. Booth, 62 U.S. (21 How.) 506, 521 (1958) (Taney, C.J.).

176 "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2. The question whether this section gave exclusive interpretive authority to Congress, or permitted judicial review of congressional interpretation, was subsequently disputed in Congress during deliberations on the Civil Rights Act of 1866 and the enactment of the fourteenth amendment. See Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 86-90.

177 Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866) (the Joint Committee on Reconstruction reported this draft to the House of Representatives in February).

178 The draft provision gave Congress "power to make all laws which shall be necessary and

and the second draft of the amendment took a very different approach. This revised version directly proclaimed that "[n]o State shall make or enforce any law [denying equal protection]"[179]—the present form of the fourteenth amendment. The underlying purpose of this revision was to anoint the judiciary as the guardian, both against states and Congress, of the principles won on the Civil War battlefields. In the interim between the two drafts, the framers thought more clearly about the prospect that representatives of the defeated rebel states would someday reenter Congress.[180] Because they could not trust future Congresses to protect their battlefield victory, the framers turned to the Court.[181]

Nothing in the original text of the Constitution so clearly recognized this transcendent judicial role. Though the Bill of Rights does more directly invite judicial enforcement of its terms against congressional action, this judicial authority neither excludes nor is necessarily superior to state authority. By contrast, the fourteenth amendment in one clear stroke elevates the judiciary above both Congress and the states. As Representative (later President) James Garfield observed in the House debate, "[W]e propose to lift that great and good [principle of equality] above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the

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proper to secure [the rights]." Id. The provision reiterated the formula in Article I, section 8 of the Constitution that—according to John Marshall's interpretation in *McCulloch*—excluded any judicial oversight of congressional action.

179 U.S. Const. amend. XIV, § 1.

180 Representative Thaddeus Stevens, who reported the second version of the fourteenth amendment to the House in April 1866, plainly revealed the concern that led the Joint Committee away from its previous reliance on enhanced congressional authority:

> Unless the Constitution should restrain them . . . [the rebel] States will all, I fear, keep up th[eir race] discrimination, and crush to death the hated freedmen. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.

Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). During the February House debate, Representative Hotchkiss had faulted the first draft of the Amendment for failing to provide safeguards against this eventuality. Id. at 1095.

181 Representative John Bingham was the principal draftsman of both the February and the April drafts of the Amendment. In his retrospective reflection on the reasoning that led him to the April revision, Bingham stated that in the interim he had "reexamin[ed]" Chief Justice Marshall's opinion in Barron v. Baltimore, 32 U.S. 243 (1833), refusing to enforce the fifth amendment against state governments on the ground that, unlike the bill of attainder clause and other direct proscriptions in the Constitution against state action, the Bill of Rights did not say "no state shall . . . ." Bingham argues, "I noted and apprehended as I never did before, [these] words [and] acting upon [Marshall's] suggestion I did imitate the framers of the original Constitution," thereby enlisting the judicial enforcement that Marshall had withheld in *Barron*. Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871).

eternal firmament of the Constitution."[182]

If Garfield truly believed that the Supreme Court dwelt in this "serene sky" beyond "political strife," he must somehow have forgotten about *Dred Scott*, decided by a presumably less ethereal body just nine years earlier. By any realistic measure, the Supreme Court's conduct in *Dred Scott* should have disqualified it from this exalted role. But by 1866, in the wake of a brutal Civil War, the wish for some oracular transcendance of political conflict was stronger than any practical appreciation of its unattainability. The Supreme Court was not a realistic candidate for this role; it was, however, the only imaginable candidate. Congressional reverie about the exaltation of the Supreme Court was a kind of temporary amnesia that took hold only during deliberations on the fourteenth amendment. It was a dream that precisely corresponded to Freud's functional hypothesis: it fulfilled a wish that was not attainable in waking life.

The framers of the fourteenth amendment soon roused themselves from this dream. Though they did not repudiate their prior reliance on judicial authority, they clearly revealed their intense ambivalence about it. John Bingham, the principal draftsman of the Amendment, provided the most striking evidence of this conflicted attitude. Just six months after Congress had sent the Amendment to the states for ratification, Bingham addressed the possibility that the Supreme Court might act against the wishes of a congressional majority:

> The original jurisdiction of that court is very restricted . . . by the terms of the Constitution. Their appellate jurisdiction . . . depends exclusively upon the will of Congress. If [members of Congress] are at all apprehensive of any wrongful intervention of the Supreme Court . . . sweep away at once their appellate jurisdiction in all cases . . . . Do this, and let that court hereafter sit to try only questions affecting ambassadors, other public ministers and consuls, and questions in which a State shall be a party, as that is the beginning and end of its original jurisdiction.[183]

If this jurisdictional denial were not sufficient to discipline the Court and it "usurps power to decide political questions and defy a free people's will,"[184] Bingham envisioned an even more punitive response: "[I]t will only remain for a people thus insulted and defied to demonstrate that the servant is not above his lord by procuring a further constitutional amendment . . . which will defy judicial usurpation by

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182 Cong. Globe, 39th Cong., 1st Sess. 2462 (1866).

183 Cong. Globe, 39th Cong., 2d Sess. 502 (1867).

184 Id.

annihilating the usurpers in the abolition of the tribunal itself."[185]

It is thus striking that just six months after Congress approved the most extensive grant of judicial authority anywhere in the Constitution to guard against future congressional action, the principal draftsman of that amendment asserted that Congress might overturn judicial rulings simply by denying jurisdiction to the Court. The irony is further compounded by the immediate context of Bingham's threat. One month earlier, the Supreme Court had decided a case which suggested to Bingham and his allies that the Court might question the credentials of the reconstructed Southern legislatures to participate in the ratification of the fourteenth amendment.[186] Thus Bingham threatened to decimate the Court's jurisdiction, and even ultimately to abolish it, unless the Court acquiesced in the ultimate ratification of an amendment granting it ostensibly transcendent authority over the actions of the national and state governments. This is surely a textbook example of ambivalence. Bingham, moreover, was not alone in this conflicted stance. Within a year, an extensive series of measures were proposed in Congress (and some were adopted) to curb judicial power.[187]

The fantasy of judicial transcendence nonetheless reasserted itself at the next significant threat of civil conflict. In 1876, the country seemed poised again at the brink of warfare in response to the inconclusive results of the Hayes-Tilden presidential contest. The election outcome depended on the voting results from three Southern states still under military rule. Initial returns indicated an easy victory for the Democrat Tilden, but these returns were quickly contradicted amid angry charges of Republican administration fraud and military interference. The constitutional mechanism for counting presidential

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185 Id.

186 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), directly addressed only the authority of military tribunals to punish civilians in war-occupied territory. The decision was widely construed by congressional Republicans as a fundamental challenge to their entire Reconstruction program. E. Foner, Reconstruction: America's Unfinished Revolution, 1873-77, at 272 (1988).

187 In 1868, Congress repealed the Court's jurisdiction to hear appeals in federal habeas corpus proceedings alleging constitutional violations; see *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). The House approved a measure requiring two-thirds vote of the Court to invalidate any congressional act, Cong. Globe, 40th Cong., 2d Sess. 489 (1868). Representative Bingham further suggested reducing the Court's membership to three, so that the two-thirds rule would necessarily follow. Id. at 483-84. Bingham's suggestion built on the precedent established by Congress in 1866—one month after its approval of the fourteenth amendment—reducing the Court membership from ten to seven, effectively barring any nominations from President Andrew Johnson. See supra note 144. Representative Garfield might presumably have justified this measure as lifting the Court "beyond the reach of the plots and machinations" of the President. It is difficult to see, however, how anyone could imagine that the subsequent congressional actions signified the Court's transcendence of "political strife."

electoral votes provided no clear direction for resolving the dispute. The Democratic House of Representatives and the Republican Senate were deadlocked about how the rival electoral votes from the three disputed states should be counted. By the end of 1876,

> [d]ebates became angrier on Capitol Hill and members began to arm themselves. Scenes on the floors of the two Houses reminded old-timers of the days of 1860-61. It had been less than twelve years since the country was at war and memories of those days were always present in this crisis.[188]

Congress turned to the Supreme Court to save the day. In January 1877 Congress created a fifteen-member Commission to count the disputed votes. The congressional act specified that five of the members were to come from the Senate (three Republicans and two Democrats), five from the House (three Democrats and two Republicans), and the remaining five members were to be Justices of the Supreme Court. The act, moreover, specifically named four of the Justices who were to serve: two were registered Democrats and two were Republicans. These four Justices were in turn to select a fifth Justice from the Court. By this complicated mechanics, the Commission was composed of seven Democrats and seven Republicans. The four judicial members were then expected to find a fifth Justice who would stand above partisan suspicion; they chose Joseph P. Bradley.[189]

The Commission's deliberations turned out to be almost a caricature of partisanship. On every disputed issue, the Commission voted solidly along party lines; on every disputed issue, Justice Bradley voted with the Republicans. By a one-vote margin on the Commission, Rutherford B. Hayes prevailed. Hayes thus has a unique status in American political history: he was not simply inaugurated, he was directly elected by a Supreme Court Justice.

Justice Bradley was widely attacked, though he steadfastly insisted that he "did not allow political, that is, party, considerations to have any weight whatever in forming [his] conclusions."[190] Whatever

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188 C.V. Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction 21 (1951) (citing P. Haworth, The Hayes-Tilden Disputed Presidential Election of 1876, at 168 (1906) ("[M]ore people [expected civil war in 1876] than had anticipated a like outcome to the secession movement of 1860-61.")).

189 The general assumption in Congress during the drafting of the Commission bill was that the fifth Justice would be David Davis, the only member of the Court with no prior party affiliation. Just as the bill was enacted, however, the Illinois legislature elected Davis to the United States Senate. Davis accepted the position, removing himself from possible membership on the Commission (and, ironically, injecting himself into politics). Justice Bradley was a registered Republican, but was nonetheless widely viewed as impartial. See C.V. Woodward, supra note 188, at 153-54.

190 Fairman, Mr. Justice Bradley, in Mr. Justice 69 (A. Dunham & P. Kurland eds. 1956).

the credibility of his claim[191]—and it was widely disbelieved at the time[192]—the very structure of the Commission membership, most notably including the named designation of the four other Supreme Court Justices based on their party affiliations, suggested from the outset that no one believed in the possibility of nonpartisan resolution. Nonetheless, no one could conceive of any peaceable resolution to the impasse unless partisanship was somehow transcended.

These events of 1876-77 vividly demonstrate the underlying impetus toward the establishment of judicial review. Whatever the supposed bases for judicial review authority in the constitutional text or in early judicial opinions, it could not take firm hold without a belief that the Supreme Court could stand above partisan political conflict. This belief, though improbable on its face and apparently belied in repeated practice, progressively took hold in response to growing fears and then bitter experience of unconstrained civil warfare. Henry Adams testified, in his *Education*, to the hope that produced the idea:

> Although, step by step, he [Adams] had been driven [by 1870], like the rest of the world, to admit that American society had outgrown most of its institutions, he still clung to the Supreme Court, much as a churchman clings to his bishops, because they are his only symbol of unity; his last rag of Right.[193]

Adams's sacramental analogy invites an adaptation of Voltaire's famous observation about the Deity—that if America had not had a Supreme Court that could peaceably resolve social conflicts by appearing to transcend politics, it would have had to invent one.

B. *The Israeli Supreme Court Charts Its Path*

Just as the Israeli judicial response to the events immediately surrounding the Six Day War of 1967 has direct parallels with John Marshall's efforts in *Marbury v. Madison*, the subsequent jurisprudence of the Israeli Supreme Court corresponds to the American developments that culminated in *Dred Scott* toward consolidating, though not yet definitively establishing, judicial review. Indeed, the boldest Israeli decision since 1967—the *Elon Moreh* case[194]—resembles *Dred Scott* in many ways.

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191 Bradley himself observed, "I know that it is difficult for men of the world to believe this, but I know it, and that is enough for me." Id. at 83.

192 See C.V. Woodward, supra note 188, at 155-62.

193 H. Adams, The Education of Henry Adams 277 (E. Samuels ed. 1974) (footnote omitted).

194 Dwaikat v. Israel, 34 P.D.(1) 1 (1979), translated in Appendix A, Military Government, supra note 50, at 404 [hereinafter Appendix A].

1. Israel's *Dred Scott*

In June 1979, the military commander of the occupied territories seized some Arab-owned land and a group of Jewish civilians, working with the assistance of army helicopters and heavy equipment, quickly erected the core of a settlement which they called Elon Moreh. The civilian settlers were members of Gush Emunim, a religiously-based movement claiming that the occupied territories were God-given in biblical times to the Jewish people and that they were now entitled to repossess this land. In seizing the Arab lands, however, the military commander made no reference to any biblical entitlement, simply alleging "military needs." The Arab owners challenged the seizure in the Israeli Supreme Court. In October 1979 the Court sustained the challenge and ordered the eviction of the Jewish settlers.[195]

The *Elon Moreh* decision was a stunning political event in Israel. The future status of the occupied territories had been a central issue in the 1977 election that had ousted the Labor party from its dominant role in Israeli politics since independence. The newly elected Likud party (led by Menachem Begin) had promised permanent possession of much, if not all, of the territories and supported the immediate, extensive establishment of Jewish civilian settlements. The Labor party had maintained that a negotiated peace with the surrounding Arab countries might someday require Israeli withdrawal from large portions of the territories and that extensive civilian settlements would be inconsistent with this possibility. Indefinite retention of the territories had implications, moreover, not simply for the prospects of peace with Arab neighbors. Permanent hegemony over the one million Arab residents in these territories would transform Israel. Would these Arabs become citizens of Israel? The resulting demography would overwhelm Israel's resolve to remain a Jewish state. Would full voting status and other political rights permanently be withheld from these Arab residents? Israel then could no longer call itself a democratic state. Would these Arab residents simply be expelled from the territories? How could Israel justify imposing this exile in light of its own bitter experience of, and historic commitment to end, the exiled wanderings of the Jewish people?

The question of Jewish settlement in the occupied territories was thus as central to the definition of Israel's national purpose as was, for America in the mid-nineteenth century, the status of slavery in its unsettled territories. In this sense alone, there was a direct analogy to

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195 Id.

Dred Scott. As in *Dred Scott*, the Israeli Supreme Court's intervention in the *Elon Moreh* case appeared to take sides in this intensely charged political issue.

When the case was first presented to the Israeli Court, it seemed unlikely that the army's action would be overturned. The same panel of five Justices that heard *Elon Moreh* had, just three months earlier, affirmed another seizure of Arab lands based on "military needs" for the construction of a civilian settlement. In the *Beth-El* case, Justice Witkon observed,

> [I]t cannot be doubted that the presence in occupied territory of settlements—even "civilian" settlements—of citizens of the occupying power contributes appreciably to security in that territory and makes it easier for the army to carry out its task. One does not have to be a military and security expert to realize that terrorist elements operate more easily in an area inhabited only by a population that is indifferent or is sympathetic towards the enemy than in an area where there are also persons likely to look out for them and to report any suspicious movement to the authorities. Among the latter, terrorists will find no hideout, assistance or supplies. The matter is simple and needs no elaboration.[196]

There were indications in *Beth-El* that the Court would not always and automatically accept a claim of "military need." The Court stated that the army's action would be measured against norms of international law specifying that private lands in occupied territory may be seized only "for the needs of the occupying forces . . . to safeguard public order and security";[197] and it found that the security considerations alleged in the case were "genuine" and were not "refuted or exposed as spurious and a camouflage for other considerations."[198] In *Elon Moreh*, the Court came to the opposite conclusion. Its reasoning was, however, more circumstantial than direct; this suggested that although the Court might readily have affirmed the military action based on its past precedent, it was actively intent on exercising independent judicial review.

The Court was unanimous in *Elon Moreh* and Justice Landau wrote the principal opinion. Landau found it significant that the initiative for the land seizure did not originate with the military. His chronology began in January 1979 when Gush Emunim members illegally demonstrated on a road near the lands ultimately seized,

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196 Ayyud v. Minister of Defense, 33 P.D.(2) 113, 119 (1979), translated in Appendix A, supra note 194, at 377 (Witkon, J.) (the Beth-El case).

197 Article 52, Hague Convention, cited in Appendix A, supra note 194, at 382.

198 *Ayyud*, 33 P.D.(2) at 115, Appendix A, supra note 194, at 376 (Justice Witkon quoting his own opinion in the Rafiah Approach case, 27 P.D.(2) 169, 181 (1973)).

demanding their rights to construct a settlement there. The Government responded by promising to locate an "area of settlement [which] will as far as possible take into consideraton the wishes" of the demonstrators.[199] The military authorities then explored several alternative sites and in May the commander reported to the Ministerial Defense Committee (composed of several Cabinet members) that "a military need existed to requisition" one site.[200] The Minister of Defense disputed this claim, but his view was overridden. In the subsequent deliberations of the full Cabinet, the Deputy Prime Minister joined the Defense Minister in opposition. Nonetheless, by a majority vote, the Cabinet resolved to go forward.

In *Beth-El*, by contrast, there was consistent unanimity about the security considerations between the military and civilian authorities. Moreover, as Landau noted in *Elon Moreh*, the dissenters within the government, the Defense Minister and the Deputy Prime Minister, both had substantial military expertise.[201] Nonetheless, such disagreement within the government would not necessarily serve as an invitation for the Court to interpose its own judgment. As Landau himself observed, the military commander's judgment ordinarily carries great weight within the Government and the Court is ordinarily quite reluctant to take sides in "a dispute . . . on professional-military questions."[202] One added element, however, appeared determinative for Landau: the affidavits submitted by the Gush Emunim settlers.

Unlike *Beth-El*, the settlers themselves joined the suit to defend their position against the Arab claims. After noting this difference,[203] Landau quoted from one of the settlers' affidavits:

> [T]he act of settling the People of Israel in the Land of Israel is an act of real security, the most effective and the most genuine. Settlement as such . . . does not, however, stem from security reasons or physical requirements but from the force of destiny, and by virtue of the Return of Israel to its land.
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> . . .[Though] the security reason has its proper place and its genuineness is not in doubt, for us it is a matter of indifference.[204]

This affidavit does not, however, necessarily establish that no legiti-

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199 *Dwaikat*, 34 P.D.(1) at 9, Appendix A, supra note 194, at 411 (Landau, J.).

200 Id. at 9, Appendix A, supra note 194, at 412.

201 Id. at 7, Appendix A, supra note 194, at 409. See also id. at 26, Appendix A, supra note 194, at 434 (Justice Witkon citing the military experience of these two dissenting Ministers and observing, "If such a Minister is not convinced, how can it be asked of us, the judges, that we should be convinced? If he sees no military necessity for establishing a settlement precisely at this place, who am I to differ from him?").

202 Id. at 8, Appendix A, supra note 194, at 410.

203 Id. at 10, Appendix A, supra note 194, at 414.

204 Id. at 11, Appendix A, supra note 194, at 414.

mate military need was served by the settlement. Though the settlers themselves did not pretend to be motivated by military concerns, the existence of the settlement might nonetheless have the effect of safeguarding military security.

This was essentially Prime Minister Begin's position in the case. At oral argument, Justice Landau raised pointed questions about the relationship of the settlers' motives to the government's security considerations. In the following day's argument, the State Attorney responded:

> I spoke with the Prime Minister and he authorized me to state after the subject came up in yesterday's session, that on many occasions, both at home and abroad, the Prime Minister has stressed the Jewish people's right to settle in Judea and Samaria but this is not necessarily connected with discussions in the Ministerial Defence Committee about concern over national defence and State security, when a specific question of requisitioning . . . for security needs comes up for discussion and decision. In the Prime Minister's view there is no inconsistency here, but two separate matters are involved.[205]

Landau noted that he "took down [this] statement verbatim because of its importance and the standing of the person in whose name" it was conveyed.[206] Landau also made unmistakably clear that he did not believe the Prime Minister's account regarding the "separateness" of the security and the religious and territorialist motivations.

> I have come generally to the view that the professional outlook of the [military commander] would not in itself have led to the taking of the decision to establish the Elon Moreh settlement, were it not for another reason which impelled the Ministerial Defence Committee and the Government in *plenum* to do so—the strong desire of the members of Gush Emunim to settle in the heart of Eretz-Israel, as close as possible to the town of Nablus. . . . [W]e have sufficient indications in the evidence before us that both the Ministerial Committee and the Government majority were decisively influenced by Zionist views on the settlement of Eretz-Israel as a whole.[207]

Landau thus rested his decision on a subtle reading of the Government's motivation: Not that security considerations were wholly absent, but that they were not the predominant impetus for action.[208] Such motivational analysis is a complex exercise in any judicial re-

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205 Id. at 16, Appendix A, supra note 194, at 421.

206 Id.

207 Id.

208 Justice Witkon appeared to base his decision on a more flat-footed conclusion, that the security considerations were "sincere" but not "accura[te]." Id. at 26, Appendix A, supra note

view, especially regarding collective governmental decisions.[209]

Elon Moreh was a bold decision—not simply in the analytic difficulties that the Court embraced in refusing to take the easily justifiable course of deferring to the government's decision, nor even in the clear implication of Justice Landau's refusal to believe the Prime Minister's depiction of his own motivation. The Court's decision was also a bold, though mostly implicit, claim for judicial prerogative—a claim that judges had a distinctive role in this dispute that other governmental actors were bound to respect.

Early in Justice Landau's opinion, this claim appears as an implicit rebuke to the army and perhaps even to the government. In setting out the chronology of the army's action, Landau related that the Arab landowners were verbally informed that their land had been requisitioned only "at 8 a.m. on the very day the land was occupied and just before the work was commenced in the area."[210] If prior practice had been followed, the landowners would have been given greater advance warning. "It is not clear," he said,

> why on this occasion those responsible deviated from past practice in like instances. The impression is created that the occupation of the land was organized as a military operation by employing an element of surprise and in order to forestall the "danger" of intervention by this Court on an application by the landowners before work began in the area.[211]

At later points in his opinion, Landau reiterated different versions of this claim for judicial prerogative. After quoting Prime Minister Begin's statement—conveyed to the Court by the Attorney General—Landau noted, "[The Prime Minister's] view about the right of the Jewish people [to settle in Judea and Samaria] rests firmly on Zionist doctrine. But the question still remains for this Court whether that view justified the taking of private property . . . and . . . the answer depends on the correct interpretation of Article 52 of the Hague Regulations."[212] This is surely a version of John Marshall's famous dictum, "It is emphatically the province and duty of the judicial department to say what the law is."[213]

194, at 433. But Witkon was more determined than Landau to avoid direct ideological disputes with the settlers and the Government, see infra note 216.

209 See Brest, *Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970) (discussing propriety of judicial review of a legislative motivation in enacting legislation).

210 34 P.D.(1) at 5, Appendix A, supra note 194, at 407.

211 Id.

212 Id. at 17, Appendix A, supra note 194, at 422.

213 Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803). At the very outset of his

Justice Landau did not, however, restrict himself to interpreting the conventional sources of law. In the passage just cited, Landau's differentiation of "Zionist doctrine" and Article 52 of the Hague Regulations apparently indicated that Zionism might be inconsistent with international law but that the Court's obligation was to effect the primacy of international law. Earlier in his opinion, however, Landau suggested an even grander interpretive role for judges. Quoting from the affidavits of the Gush Emunim settlers, Landau stated that the settlers rested their territorial claims on the biblical passage, "And you shall take possession of the land and dwell therein, for unto you I have given the land to inherit it."[214] He then observed:

> Those who do not share the views of the deponent and his companions will respect the profound religious belief and self-sacrifice spurring them on. We, however, sit in judgment in a State based on law in which the *Halakha* (religious law) is applied only insofar as secular law allows it, and we must apply the law of the State. As to the deponent's view concerning title to land in the Land of Israel, I assume that he does not mean to say that according to the *Halakha* one may forthwith deprive non-Jews of their private property. The Bible says explicitly: "The stranger that sojourneth with you shall be unto you as the home born among you, and thou shalt love him as thyself for ye were strangers in the land of Egypt" (*Leviticus* 19:34). I find in the collection of literature submitted by counsel for the additional respondents that Chief Rabbi Y. Z. Hertz, of blessed memory, mentioned this verse when the British Government sought his opinion on the draft text of the Balfour Declaration. In reply he said that mention of the civil and religious rights of the non-Jewish communities in the draft declaration were simply a translation of this basic principle from the Torah . . . . That was the authentic voice of Zionism which insists on the Jewish people's right of return to its land . . . but which has never sought to deprive the residents of the country, members of

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opinion, Landau seems (at least to an American reader) directly to evoke Marshall's stance in *Marbury*:

> [As judges, we are] proscribed [from] interpos[ing] our personal views as citizens of the State. It is, however, still greatly to be feared that the court will appear to be abandoning its proper place and descending into the arena of public debate, and that its decision will be received by one part of the public with acclamation and by another part with utter emotional rejection. [Nonetheless I am] bound by the obligation to decide in accordance with the law . . . knowing well from the outset that the public at large will not pay attention to the legal reasoning but only to the final conclusion, and that the proper status of the court as an institution is likely to be prejudiced. . . . But what else can be done? That is our task and our duty as judges.

34 P.D.(1) at 4, Appendix A, supra note 194, at 405.

214 34 P.D.(1) at 11, Appendix A, supra note 194, at 414 (quoting Numbers 33:53).

other peoples, of their civil rights.[215]

In this remarkable passage, Justice Landau did more than assert the primacy of secular over religious law. He also engaged in a brief disputation about the meaning of the religious law itself, concluding that there was a true Zionist understanding of these precepts—"the authentic voice of Zionism" which respects the civil rights of non-Jews. This passage amplified Landau's treatment of Prime Minister Begin's claim for the Jewish people's right to settle in Judea and Samaria. Landau interpreted Zionist doctrine not as conflicting with international law norms but as mandating respect for those norms that safeguard property and other civil rights of Arabs. He seemed to claim primacy both for his interpretation of biblical norms as against the position taken by the Jewish settlers, and for his vision of the relation between biblical norms and the Zionist ideal as against the apparently contrary understanding of Zionist doctrine asserted by the Prime Minister of Israel. In this sense, Justice Landau is claiming to issue definitive interpretations of Zionism by speaking in his judicial role as "the authentic voice of Zionism."

This claim for judicial supremacy appeared only for a fleeting moment in this one passage of his opinion. It did not, however, go unnoticed in the Court; Justice Witkon pointedly took distance from the passage.[216] Moreover, Landau himself would undoubtedly disclaim the pretensions to judicial supremacy and to the status of the authoritative interpreter of the Zionist tradition that I have discerned in this one passage. This disclaimer was at the core of his assertion ten years earlier in the *Shalit* case: "What can the court contribute to the solution of an ideological dispute such as this which divides the public? The answer is—nothing, and whoever expects judges to produce a magic formula is merely deluding himself in his naiveté."[217] Landau distinguished *Shalit* in *Elon Moreh*: "This time we have valid sources for deciding . . . ."[218] Presumably, Landau had in mind the standard of "military need" in the Hague Convention. But, as his own opinion demonstrated, Landau could not apply this standard without also addressing issues of deep ideological dispute.

Landau's treatment of these issues evokes another parallel with

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215 Id. at 11-12, Appendix A, supra note 194, at 415.

216 "Let one thing be clear; without dissociating myself as such from the observations of my learned colleague, Landau J., I myself have no need to dispute with the settlers their religious or national outlook. It is not our concern to enter into political or ideological debate." Id. at 28, Appendix A, supra note 194, at 436.

217 Shalit v. Minister of the Interior, 23 P.D.(2) 477, 520, Special Volume Selected Judgments, supra note 36, at 82 (1970).

218 *Dwaikat*, 34 P.D.(1) at 4, Appendix A, supra note 194, at 405.

the United States Supreme Court's decision in *Dred Scott*. The divisive underlying dispute in that case was between a conception of religiously based moral law that condemned slavery and the secular law of the Constitution that protected private property rights in slaves and thereby apparently ensured the continued political union of discordant peoples. The prospect of civil war over territorial slavery prompted the majority Justices in *Dred Scott* to assert the primacy of property rights and the supremacy of their role as judges in interpreting and protecting these rights. This same vocabulary ironically applies to the dispute in *Elon Moreh*: the property rights of Arabs set against the biblical claims of the Jewish settlers, and the prospect of warfare that the Court attempts to avert by asserting the priority of the secular law.

The context of the dispute in *Elon Moreh*, the urgency and enormity of the stakes, called forth the same judicial role in Israel—even from the skeptical and reluctant Justice Landau—that had emerged in the United States a century earlier in *Dred Scott*. In *Shalit*, Landau had warned against "exacerbat[ing] conceptual differences through . . . zealotry and disputatiousness," and had applauded the virtues of "searching for a tolerable *modus vivendi* by way of essential compromise."[219] But in *Shalit*, Landau saw no special judicial role to this end. In *Elon Moreh*, it appeared as if Landau had resolved to use his institutional authority directly to combat "zealotry and disputatiousness" and to lead the search for tolerance and compromise.[220]

In practical terms, the *Elon Moreh* decision has had only limited effect in impeding civilian Jewish settlements in the occupied territory. When the decision was initially rendered, there was some doubt about whether it would have any effect, even on the parties directly involved in the case. As Landau had predicted, a firestorm of protest immediately erupted from the politically potent right-wing. The settlers themselves vowed resistance. Notwithstanding its ideological sympathies for the settlers, the Likud government enforced the

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219 *Shalit*, 23 P.D.(2) at 519, Special Volume Selected Judgments, supra note 36, at 81.

220 Pursuit of this goal appeared to be the impetus for an independent, alternative ground for invalidating the settlement that Justice Landau set out at the end of his opinion. He held not only that the army seizure of land was not supported by military need but also that the settlers' testimony established their intent to create a permanent settlement, whereas international law permitted only temporary settlements in occupied territory by citizens of the occupying force. *Dwaikat*, 34 P.D.(1) at 21, Appendix A, supra note 194, at 427. Strictly speaking, reliance on this additional ground was not necessary for deciding the case. This ground, however, established even more clearly than the "military need" rationale that all settlements in the occupied territories existed only so long as the military occupation itself persisted. The implication accordingly followed that in any peace negotiations, all lands taken for the settlements would be rescindable and thus available for negotiated return.

Court's decision, even threatening to use army troops forcibly to remove the settlers from the land.[221] This governmental action represented an important symbolic victory for the Court's institutional authority as the legitimate and politically transcendent embodiment of the rule of law.

Though the government bowed to the letter of the Court's decision, it resisted in spirit. After months of acrimonious debate within the Cabinet and the Knesset, the government adopted a policy sharply constricting the practical force of the Court's ruling. A specially created ministerial committee launched an aggressive course of challenges to Arab landholding titles in the occupied territories.[222] By taking advantage of Israeli control of land records in the territories, this committee designed a bureaucratic strategy that succeeded in reclassifying large tracts of land from "private" to "unoccupied" status, thus avoiding the restrictive standards on private land seizure espoused in *Elon Moreh*.[223] The Elon Moreh settlement itself was relocated to "unoccupied" lands near its original site.[224] Overall, the numbers of civilian settlers in the occupied territories has increased from some 3,000 in 1979, when *Elon Moreh* was decided, to approximately 70,000 in 1988.[225] While the Supreme Court itself has not retreated from the principles laid down in *Elon Moreh* regarding the

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221 See Lustick, Israel and the West Bank After Elon Moreh: The Mechanics of De Facto Annexation, 35 Middle E.J. 557, 563-64 (Autumn 1981).

222 The committee was chaired by Minister of Agriculture Ariel Sharon, an ally of Gush Emunim, who had apparently advocated outright defiance of the *Elon Moreh* decision in Cabinet deliberations. Id. at 565-66.

223 In the two years following the [Beth-El] and Elon Moreh decisions the military government is reported to have issued more "declarations of state land" than in the preceding 12 years of the occupation, with the trend accelerating in early 1981. The purpose of these wholesale "realizations" was to shift the burden of proof and litigation onto the shoulders of Arab landowners, and thereby to put at the disposal of Israeli settlements private lands whose ownership could not, within 21 days, be demonstrated to the satisfaction of military tribunals. The largest of these tracts were 3,700 acres southwest of Nablus, 5,000 acres northwest of Hebron, 4,000 acres between Jerusalem and Jerico, and 1,000 acres southeast of Nablus. The effectiveness of this technique arises in part from the brevity of the time allowed for the presentation of an appeal, the expense involved in the preparation of the detailed maps and other documents required by the tribunal and in the hiring of a lawyer, and the bewilderment of semi-literate peasants faced with legal proceedings over issues and in a language (Hebrew) that they do not comprehend.

Id. at 571 (citations omitted).

224 Id. at 564.

225 J. Kifner, Jewish Settlers Seek Roots in a Hostile Land, N.Y. Times, May 1, 1988, § 4 (Week in Review), at 3. Most of this post-*Elon Moreh* settlement is concentrated in portions of the occupied territory near Jerusalem and Tel Aviv. These settlers are mostly secular suburbanites attracted by commuting convenience and relatively low prices for the government-sponsored buildings, rather than religiously committed Gush Emunim members asserting their biblical destiny to repossess Judea and Samaria.

protection of acknowledged Arab property, it has not effectively applied those protective principles against the relentless grinding of the bureaucratic mechanisms arrayed against Arab landholding status.[226]

The restricted efficacy of *Elon Moreh* testifies to two related propositions: the persistent caution of the Supreme Court in its approach to politically divisive issues and the intrinsic limits on judicial power when confronting significant executive or legislative resistance. Notwithstanding these qualifications, however, *Elon Moreh* was a striking judicial challenge to governmental action in a highly charged political context—a challenge that has had a continuing impact on Israeli politics and governmental conduct.[227] The decision, moreover, also set a pattern—or, perhaps more precisely, it revealed the pattern—that subsequent Supreme Court interventions appeared to follow in contentious political disputes. The apparent pattern was for decisions that proclaimed high principle, resounded with considerable symbolic significance, and yet seemed limited in their immediate practical impact. The same principle at the heart of *Elon Moreh* was, moreover, of paramount concern in the later decisions: the principle of tolerance for political and ideological difference. The symbol throughout was the rule of law as an instrument for judicial protection of vulnerable minorities.

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226 The central limitation on the Supreme Court's intervention in these land claims disputes has been jurisdictional. Notwithstanding the Court's position that it has personal jurisdiction over the acts of military officials, it has not taken jurisdiction over the acts of military "courts or tribunals" on the ground that its statutory grant of jurisdiction over bodies "vested with judicial or quasi-judicial power" does not extend outside Israel proper. See Nathan, The Power of Supervision of the High Court of Justice over Military Government, in Military Government, supra note 50, at 122-24. Unlike the direct army requisition of private lands at issue in *Elon Moreh*, disputes regarding the existence of landholding claims within the occupied territory are addressed by military tribunals over which the Supreme Court exercises no appellate jurisdiction. See R. Shehadeh, Occupier's Law: Israel and the West Bank 21, 87-88, 98 (1985).

227 Ironically, although its substantive demands were fulfilled by the government's administrative response to the Elon Moreh decision, the break-up of Gush Emunim as a unified political force can be traced to that ruling. The fundamental and explicit nature of the issues addressed in the Elon Moreh case led the settlers . . . to demand official, formal, and legal sanction for the permanent incorporation of the West Bank in Israel. But the government refused to change the legal status of the territories. In their arguments before the Court, and in subsequent cases, government lawyers have accepted the High Court's reasoning in regard to the status of the West Bank as under "belligerent occupation" and the applicability of the Hague Convention's prohibition of "permanent" settlements and the "expropriation" of land for settlement purposes (as opposed to its temporary "requisition"). The government's unwillingness to move toward formal annexation resulted in a serious political defeat for Gush Enumim and exposure of its demands as outside the "national consensus" in Israel.

Lustick, supra note 221, at 573.

2. Judicial Injunctions to Tolerate the Intolerant

The pattern of decisions with symbolic significance and little practical impact was evident in a notable series of cases that confounded the politics of *Elon Moreh*. In these subsequent cases, the Court extended its protection to Rabbi Meir Kahane, a fierce advocate for the expulsion of all Arabs from the occupied territories and from Israel itself. In a 1984 decision, the Court overturned a ruling by a Knesset committee that barred Kahane's party from listing itself on the ballot in the forthcoming national election.[228] The committee had ruled that Kahane's party should be excluded from the Knesset election ballot because it "propounds racist and anti-democratic principles that contravene the Declaration of Independence of the State of Israel, openly supports acts of terror [and] tries to kindle hatred and hostility between different sections of the population in Israel."[229] The Court unanimously overturned this ruling—four Justices[230] holding that the elections committee had no statutory authority to exclude a party list based on its antidemocratic character, and one stating that though such general authority existed, the committee had not shown a sufficiently specific likelihood of harm from Kahane's advocacy.[231]

The Court's action on its face may appear as a simple exercise in statutory construction. The boldness of its action was, however, apparent by contrast with the Court's 1965 decision upholding the ballot exclusion of an Arab-dominated party whose platform advocated the end of Israel as a specifically Jewish state. In the Court's 1965 decision, a majority found adequate, even though only implicit, statutory authority in the elections committee for excluding a party that "oppose[d] the stability and the very existence" of Israel.[232] In a spirited dissent, Justice Chaim Cohn argued that such exclusion violated freedom of association and opinion and, even if the statutory authority existed, the exclusion should occur only where necessary "to prevent a present, clear and substantial danger."[233] The Court's decision in the 1984 Kahane party case can technically be distinguished from

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228 Neiman & Avneri v. Chairman of the Cent. Elections Comm. for the Eleventh Knesset, 39 P.D.(2) 225 (1985). The case also involved the ballot exclusion of the left-wing Progressive Peace party, which the Court similarly overturned.

229 Id. at 225-26.

230 President Meir Shamgar, Deputy President Miriam Ben Porat, and Justices Moshe Beisky and Menachem Elon.

231 Justice Aharon Barak construed the statute to require a finding of a "clear and present danger" to public order in light of the actions, and not simply the platform, of the challenged party. 39 P.D.(2) at 311, 315-17.

232 Yardor v. Chairman of the Cent. Election Comm. for the Sixth Knesset, 19 P.D.(3) 365, 385 (1965).

233 Id. at 381.

the majority holding in this earlier decision. Its approach to statutory construction and its overall tone had, however, more in common with Justice Cohn's dissent, both in his demand for an explicit legislative enactment before accepting any derogation of the associational principle at stake and in his insistence on a stringent proof standard in any judicial enforcement of such an enactment.

In the 1984 Kahane decision, President Shamgar observed that "[t]he central problem stems from the need to determine standards, founded on democratic beliefs and opinions, that will be applied to those who do not adhere to democracy and its values . . . [,] the problem [of] '[t]he [t]oleration of the [i]ntolerant.' "[234] The five Justices participating in the Kahane case had different attitudes toward this problem, some more willing than others to insist on toleration for intolerance.[235] They nevertheless appeared united in using their judicial authority to serve this liberal value, more so than the Court had been twenty years earlier.

In the election that followed this 1984 decision, Kahane's party attracted enough votes to elect him to the Knesset. He was treated there, however, as a pariah. Though none of the contesting parties secured enough seats to form a government, and intricate negotiations took place to construct coalitions with small factional parties, all parties agreed that none would accept Kahane's support. After the Knesset was organized, this scornful isolation of Kahane persisted and he returned to the Supreme Court for protection. In the first case, the Chairman of the Knesset refused to accept a no-confidence motion submitted by Kahane on the ground that Knesset operating rules permitted such motions only on behalf of "party factions" and Kahane, as a one-member faction, did not qualify. In August 1985, the Supreme Court overturned this ruling.[236] To justify judicial review of a rule prescribing internal legislative procedures, Justice Barak (writing the sole opinion in the case) quoted from a United States Supreme Court decision, " 'it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.' "[237] Barak then observed, "These words are not special to a legal system in which there is a formal constitution, and which recognizes judicial review of

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234 *Neiman & Avneri*, 39 P.D.(2) at 277-78 (quoting J. Rawls, A Theory of Justice 216 (1971)).

235 Justice Beisky thus observed regarding the substance of Kahane's party platform: "Tones such as these are so grating from the not too distant past that a democratic state such as ours may defend itself against them, in spite of all the patience and tolerance that democracy requires for the other person's views." 39 P.D.(2) at 334.

236 Kach Party v. Hillel, Chairman of the Knesset, 39 P.D.(3) 141 (1985).

237 Id. at 153 (quoting Powell v. McCormick, 395 U.S. 486, 549 (1969)).

the lawfulness of legislation. These words are fundamental truths in every legal system in which there is an independent judicial branch."[238]

Two months later, the Supreme Court addressed Kahane's complaint regarding the Knesset Chairman's refusal to accept two bills Kahane submitted. The Chairman had refused on the ground that Kahane's bills " 'contain[ed] racist statements that are offensive and have no place in the law, and because they violate[d] values that are fundamental to the State of Israel and its democratic character and the honor of the Knesset.' "[239] The Court again overturned the Chairman's action; Justice Barak, again writing the sole opinion, stated:

> We understand the sympathies of the Chairman of the Knesset and his deputies. We agree with them that the petitioner's two bills violate fundamental principles of our constitutional regime, arouse terrible memories and have the potential to damage the democratic nature of the State of Israel. If, nevertheless, we are of the opinion that they should be set on the Knesset agenda, it is precisely because of the democratic values cherished by the Chairman of the Knesset and his deputies, and which the petitioner would violate. Our fortitude lies in meticulous observation of the rule of law and the legality of government, even where that entails the expression of views from which we recoil.[240]

Two weeks after this decision, the Knesset enacted a statute explicitly giving its Chairman authority to refuse submission of a bill which "is racist in its essence or denies the existence of the State of Israel as the state of the Jewish nation."[241] Kahane returned to the Supreme Court, but this time the Court refused him any relief. The Knesset thus unmistakably rejected the specific application of the liberal value endorsed by the Court, and the Court quietly drew back.[242]

The Court did not, however, withdraw from the field of conflict. In 1987, it overturned the policy of the state-owned Broadcasting Authority that effectively excluded Kahane from all television and radio

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238 Id.

239 Kahane v. Hillel, Chairman of the Knesset, 39 P.D.(4) 485, 487 (1985) (quoting the Chairman of the Knesset). The first bill would have limited Israeli citizenship, voting, and governmental officeholding privileges to Jews; the second bill would have required separate public facilities and beaches for Jews and non-Jews, barred non-Jews from residence in Jewish neighborhoods without majority Jewish consent, and forbade marriage or sexual relations between Jews and non-Jews including the dissolution of prior such marriages.

240 Id. at 96.

241 *Kahane*, 39 P.D.(4) at 486.

242 Id. at 486. Kahane claimed that this enactment was in contempt of the prior judicial ruling. The Court observed, however, that its judgment had not ordered the Knesset Chairman to take or to refrain from any specific action. Id. at 487.

coverage except for brief "newsworthy" vignettes.[243] Once again Justice Barak spoke for the Court. He rested his decision on the significance of the free speech principle at stake, holding that the Authority could not impose a blanket ban on Kahane and, moreover, could only exclude him from specific media appearances if it found a "near certainty of a real danger to the public order."[244] Addressing the role of the judiciary in interpreting legislation to overrule a contrary interpretation by the administering agency, Barak observed that no law "stands alone"; rather, each law is part of an "integrated system" and the "overall responsibility [for] unifying all those frameworks [of specific laws] . . . belongs to the Supreme Court."[245]

These cases involving Rabbi Kahane are not isolated instances of Israeli judicial activism to protect liberal values of tolerance.[246] There are many other contemporary examples: cases overturning administrative actions (such as police bans on demonstrations[247] and prison search procedures[248]), overseeing various actions of the military authorities in the occupied territories,[249] and invalidating legislative enactments under the *Bergman* doctrine regarding "entrenched" pro-

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243 Kahane v. Executive Bd. of the Broadcasting Auth., HC 399/85 (July 27, 1987).

244 Id. at 55 (typescript edition). Justice Barak noted that the requisite injury to "public order" was "not limited to security or the prevention of violence. It includes also protection of human dignity and the public's feelings, including majority or minority ones." Id.

245 Id. at 71.

246 In the last 15 years or so, the [Israeli Supreme] Court has been becoming increasingly more activist in its protection of human rights. This has led to significant developments in the legal principles concerning such matters, for example, as the right to congregate and demonstrate, as well as political rights specifically concerned with that of the electoral process. Moreover, the Court has increasingly demonstrated a willingness to challenge the factual and legal correctness of governmental assertions of "security interests" as grounds for restricting human rights.

Goldstein, Judicial Protection of Human Rights Without a Formal Written Constitution: The Israeli Experience, in Papers Presented to the International Congress on Procedural Law for the Ninth Centenary of the University of Bologna, Vol. II, 75, 84 (1988).

247 See Temple Mount Loyalists Soc'y v. Police Commander of the Jerusalem Region, 38 P.D.(2) 449 (1984) (overturning refusal to allow religious Jews to conduct public prayer meeting at the Temple Mount); Levi v. Commander of the S. Dist. of the Israel Police, 38 P.D.(2) 393 (1984) (overturning refusal of demonstration permit); Sa'ar v. Minister of the Interior, 34 P.D.(2) 169 (1980) (same).

248 Kaplan v. The Prison Serv., 34 P.D.(3) 294 (1980) (overturning use of enemas for narcotics searches in prison).

249 See Samara v. Military Commander of the Judea & Samaria Region, 34 P.D.(4) 1 (1980) (overturning refusal on "security grounds" of Arab residence permit in occupied territory); Almasaulia Coop. v. Commander of IDF Forces in the Judea & Samaria Region, 37 P.D.(4) 785 (1983) (upholding road building plan undertaken by military authority as an "exercise for the benefit of the local population" complying with the Hague Convention, id. at 811, but specifying that the "presumption" favoring military security actions "has no application as regards the Military Government's 'civilian' power to secure the public order and life, and certainly not when dealing with a long-term military government," id. at 810).

visions of Basic Law.[250]

A recent Supreme Court decision at least implicitly combatted intolerant impulses in current Israeli political life by abrogating a legislative resolution withdrawing immunity from an Arab member of the Knesset.[251] In so doing, the Court skated virtually to the edge of the hornbook premise of legislative supremacy. In the earlier cases involving Rabbi Kahane, the Court had overturned actions by the Knesset Chairman or legislative committees, but in the immunity case the full Knesset had voted to withdraw a "non-entrenched" statutory entitlement.[252] Nonetheless, in overturning the Knesset action, the Court majority carefully noted that the Knesset acted by resolution (which requires only one reading before passage) rather than by formal statute (which requires three readings). President Shamgar accordingly based his decision on the ground that the Knesset resolution was simply subordinate to, and in specific violation of, the general statute providing legislative immunity to all Knesset members. The other majority Justices (Barak and Shlomo Levine) disagreed with Shamgar's reading of the general statute, finding authority in it for withdrawal by resolution. Nevertheless, they held that the Knesset was obliged to make specific ("quasi-judicial") findings of fact before it could exercise this statutory authority. In effect, these two Justices viewed the Knesset as if it were an administrative agency exercising delegated authority and deduced the imperative for judicialized fact-finding procedures from this subordinate status. Thus, even in this case, the textbook rule of legislative supremacy remained formally untouched but carefully encircled.

Cautious encirclement of legislative and executive authority has been the dominant theme of the Israeli Supreme Court's contemporary work. This does not mean, however, that the Court has consistently overturned legislative and executive actions.[253] Most recently, for example, the Court affirmed the exclusion of Rabbi Kahane's Kach Party from participation in the 1988 Knesset elections, pursuant to a specific statute enacted in response to the Court's earlier deci-

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250 See Derech Eretz Ass'n v. Broadcasting Auth., 35 P.D.(4) 1 (1981) (overturning Knesset law changing allocations of broadcast time for political parties in election campaigns); Rubinstein v. Chairman of the Knesset, 37 P.D.(3) 141 (1983) (overturning Knesset law retroactively reimbursing political parties for electoral campaign expenses). For discussion of the *Bergman* doctrine, see supra text accompanying notes 106-11.

251 Ma'arri v. Speaker of the Knesset, 41 P.D.(4) 169 (1988).

252 Id.

253 Cf. Shapira, supra note 15, at 425 ("[O]ne encounters in the decisional storehouse of the Supreme Court manifestations of liberal activism alongside indications of submissive restraint.").

sion regarding the 1984 elections.[254]

Even in the numerous contemporary cases where the Court affirms legislative or executive actions, however, there is a marked difference from the Court's conduct during the pre-1967 era. In the early cases, the Court was often elaborately deferential toward legislative and executive authority (though it was also often, and occasionally inconsistently, prepared to overturn that authority). In the contemporary cases, although the Court is often deferential, it typically now insists that it is exercising at least some measure of independent judgment rather than simply deferring to legislative or executive discretion.

One recent case illustrates this trend. In May 1988 the Interior Minister ordered the deportation of Mubarak Awad, a prominent Arab who claimed to be an advocate of Gandhian nonviolent resistance to the Israeli presence in the occupied territories. The Court rejected Awad's petition against the deportation order. It refused, however, to accept the government's contention that the Minister's "discretion is absolute, and does not even require reasoning."[255] The deportation power, the Court said, is "wide [but] not without limits [and l]ike any governmental power, it must be exercised within the frame of the objectives of the authorising statute."[256] The Court then briefly reviewed the factual basis for the deportation order and found that "even according to the petitioner's own version, his activity is aimed against Israeli rule"[257] in the occupied territories.

Strictly speaking, Awad's legal claims against deportation were not weighty; though he had been born in east Jerusalem, he had become an American citizen in 1978 and was present in Israel under an expired tourist visa. The context of his case was, however, highly charged because of the Palestinian uprising in the territories and Awad's international prominence. For a court determined to protect free speech values, this context justified special judicial scrutiny to ensure that executive officials were not invidiously targeting Awad for political retaliation, notwithstanding the apparent regularity of their technical legal position. For a court determined to give reassurance

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254 Kach Party v. Chairman of the Cent. Elections Comm., — P.D. — (decided October 18, 1988) (official translation available at Cardozo Law Review). The Court stated that legislative "curtailment of freedoms, including the right to be elected, requires direct and explicit legislation which will set clear boundaries and will not leave the matter to the unlimited discretion of an administrative or other authority." Official translation at 7. It purported to find such a directive in the Knesset enactment.

255 Awad v. Shamir, HC 282/88, typescript edition at 21 (C. Shalev trans.) (copy available at Cardozo Law Review).

256 Id.

257 Id. at 22.

that the rule of law was truly honored in this politically charged case, independent judicial scrutiny was also more desirable than an avowedly deferential bow by judges toward executive officials. In one sense the independent judicial evaluation displayed in *Awad* was simply an application of ordinary administrative law doctrine that has progressively developed during the past two decades.[258] In a deeper sense, however, the *Awad* case illuminates the impetus from the 1967 war for the development of this doctrine of independent judicial scrutiny.

The persistence of the occupation—now dramatically challenged by the Palestinian uprising—combined with other polarized aspects of Israeli domestic life have in themselves raised doubts about the rule of law that judges have felt impelled independently to address and to appease.

This same impetus can be discerned in the background of the development of the standing doctrine in the Israeli Supreme Court. In recent years, standing requirements have been markedly liberalized.[259] Two recent instances of this liberalization indicate, however, that this trend does not necessarily or even primarily reflect judicial wishes for added opportunities to overturn governmental actions. In a 1987 case, the Court acknowledged the standing of a group of law professors to challenge the legality of a presidential pardon granted to Israeli intelligence officials who had allegedly coerced confessions from political prisoners and committed perjury in subsequent court proceedings.[260] The Court majority, however, upheld the legality of

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258 See Shaked, Comments on Judicial Review of Reasonableness of Administrative Action, 12 Mishpatim 102 (1982); Shapira, supra note 15, at 425 n.91 ("The Supreme Court, exercising judicial review of administrative action in its role as the High Court of Justice, has recently displayed a growing tendency to tighten its control over governmental organs.").

259 In general, traditional Israeli law has been . . . wary of "officious intermeddlers" who seek to vindicate not their own private interests, but rather those of others.

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. . . [I]n recent years there has been a strong movement in the High Court of Justice to widen the basis of standing. There is, however, no consensus among the judges as to the correct test for standing today. At one extreme, a minority view would abolish altogether the need for the petitioner to assert a personal interest. . . . Under this view the Court would entertain any action brought by a sincere and serious petitioner who sets forth a public problem that requires a solution in the interests of justice. At the other extreme, there are judges who continue to follow the traditional, restrictive view . . . . Finally, there is the middle view, that probably constitutes a majority of the judges, that would continue to require a personal interest of the petitioner but would be much more flexible and pragmatic than the traditional view.

Goldstein, supra note 246, at 84, 86-87.

260 Barzilai v. State of Israel, 40 P.D.(3) 505 (1987).

the pardon.[261] Similarly, in a 1988 case, the Court accepted the standing of an army inductee to raise, in effect, an "equal protection" challenge to the general exemption from army service of observant Jews, notwithstanding that such standing had been denied in several previous cases. Having granted standing, however, the Court rejected the challenge on its merits.[262] In his separate opinion, Justice Barak noted an apparent paradox: the Court had on several previous occasions refused to adjudicate this same challenge on standing grounds and now granted standing only to dismiss the challenge. It is better, he concluded, for the Court to address the merits since the rule of law will thus clearly be vindicated.[263] These two standing cases reveal the trend that consistently underlies the contemporary Israeli cases, whether they affirm or overturn governmental actions: the Court is displaying independent judgment to vindicate the rule of law ideal and is thus conflating this ideal with judicial authority.

3. The Promise and Problems of Judicial Independence

In practical terms, two radically different effects can arise from this judicial trend: either the Court can significantly constrain executive and legislative actions by an aggressive exercise of independent judicial scrutiny; or the Court can reassure and embolden executive and legislative officials because, more often than not, it will bolster public confidence in their actions by adding the prestige of an ostentatiously independent judicial imprimatur to their actions. At the zenith of its post-Civil War consolidated authority, in the late nineteenth and early twentieth century, the United States Supreme Court took the latter path. In its landmark decisions—*In re Debs*[264] suppressing the Pullman strike of 1894; *Plessy v. Ferguson*[265] upholding

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261 For an illuminating discussion of the case and its connections to the 1967 War, see Lahav, supra note 83.

262 Ressler v. Minister of Defense, HC 910/86 (C. Shalev trans.) (copy available at Cardozo Law Review).

263 One might ask whether it would not be wiser to adopt the approach taken in the past, whereby the petitions were dismissed summarily without a hearing on the merits, rather than dismiss the petition on its merits. . . . [But] the rule of law is reinforced if the court examines the legality of a governmental action on its merits and arrives at the conclusion that it is lawful. The rule of law is faulted if the court refuses to examine the merits of the legality of an action that might be illegal and leaves it hanging "on the threshold." . . . The court will fulfil its function as the guard of the rule of law, the separation of powers and the values of democracy. Could there be a better result than this?

Id. at 81-82 (Barak, J.).

264 158 U.S. 564 (1895).

265 163 U.S. 537 (1896).

race segregation laws; *Whitney v. California*[266] approving a conviction of "criminal syndicalism" for organizing a radical political party; *Buck v. Bell*[267] upholding compulsory sterilization of "mental defectives"—the Court essentially underwrote the executive and legislative imposition or reinforcement of social order against challenges from dissatisfied and disruptive outsiders. Even the Court's line of decisions epitomized by *Lochner v. New York*,[268] striking down state and federal economic regulatory laws, were directed more toward supporting conventional social (albeit "private") authority than against governmental authority.[269]

The Israeli Supreme Court has not (or at least has not yet) embarked on this path of reflexively underwriting the imposition of social order. Israeli officialdom today appears more wary than comfortable at the prospect of judicial review. Though critics of the Court maintain that it has been excessively deferential to executive and legislative officials,[270] there are good reasons for concluding that the Court's interventions (notwithstanding their occasional and cautious character) have significantly constrained official actions. For example, in the occupied territories, although the Court has never ultimately overturned a deportation order, it has remanded such orders for reexamination on notable occasions. In general, the prospect of judicial review has apparently induced caution and meticulous observance of procedural regularity by the military authorities.[271] Similarly, although the Court has never issued a final judgment against punitive destruction of Arab homes for "terrorist activities," it has demanded justification for such action.[272] The military has frequently desisted after oral argument on Arab petitions or even after the simple filing of a petition.[273] These examples suggest that even in the explosive context of military occupation, the Court has refused to provide any reflexive imprimatur to the exercise of governmental authority.

The Court's capacity to maintain this independent stance will inevitably be subject to strains, particularly in responding to the implications of the escalated hostilities in the recent uprising in the

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266 274 U.S. 357 (1927).

267 274 U.S. 200 (1927).

268 198 U.S. 45 (1905).

269 See R. Burt, Two Jewish Justices: Outcasts in the Promised Land 92-93 (1988).

270 See, e.g., E. Cohen, Human Rights in the Israeli-Occupied Territories 1967-1982, at 103-04 (1985); R. Shehadeh, supra note 226, at 100.

271 E. Cohen, supra note 270, at 107; R. Shehadeh, supra note 226, at 99.

272 See Hamri v. Commander of Judea and Samaria, 36 P.D.(3) 439, 443 (1982) ("[T]he severity of the measure taken by the military commander [must] be related to the severity of the act committed . . . and only in special cases will the measure of demolition be taken.").

273 Interview with Dorit Bainish, Israeli Ministry of Justice, Jerusalem (July 2, 1987).

territories. It is possible, perhaps even likely, that the Israeli government will react to the uprising with increasingly repressive executive and legislative measures. This escalation would present the Court with special difficulties because it has come so far in its recent jurisprudence toward exercising visibly independent judgment regarding governmental actions. Unless the Court is prepared openly to repudiate this recent jurisprudence, its affirmation of governmental actions will inevitably carry some suggestion of independent approbation. Indeed, in the face of escalated governmental efforts to repress the uprising, the Court cannot maintain its current restrained stance—regarding such measures as deportations or home destructions—without implicitly (even if unintentionally) providing these governmental actions with some legitimizing imprimatur. If the Justices want to remain protective of their Court's institutional integrity and their personal honor, their exercise of independent judicial scrutiny must amount to more than formulaic recitations in decisions that repeatedly reach apparently deferential results. If the Court persists in its currently expressed will to independence, it may thus be required to make even further inroads on the textbook principle of legislative supremacy than it has undertaken thus far.[274]

A coherent doctrinal basis is readily available for the Israeli Court to develop toward this end. The key element would rest in the jurisdiction vested in the Court by the Knesset. The principle of legislative supremacy would dictate that the Knesset has absolute, judicially unreviewable authority to withhold general grants of jurisdiction from the Supreme Court. If the Knesset grants jurisdiction, however, the Court can view itself not only as free but also as obliged to apply its understanding of basic democratic principles in interpreting a specific statute or executive authority claimed under a statute.[275]

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[274] This principle is under direct challenge by various proposals for a Constitution or an entrenched Bill of Rights that have recently gained political attention in Israel. The President of Israel, Chaim Herzog, has endorsed the formulation of a constitution through an " 'apolitical national debate, [to be] based on a new national consensus.' " Jerusalem Post, Oct. 3, 1987, at 1, col. 1 (quoting Herzog). See also Will Israel Finally Get a Constitution?, N.Y. Times, Aug. 16, 1987, § E, at 26, col. 1 (draft constitution presented by legal scholars at Tel Aviv University).

[275] Under current Israeli law, the jurisdiction of the Supreme Court is quite extensive. The Court is authorized to review the actions of any "State authorities . . . officials . . . and individuals [who] exercise any public functions," Sec. 7(b)(2), Basic Law: Courts 5717-1957; see supra text accompanying notes 70-72, for the use of this jurisdiction over military authority in the occupied territories. The Court also has jurisdiction to "deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." Id. § 7(a). This latter jurisdiction has been described by the Supreme Court as a "wide and all-embracing authority." Building & Dev. of the Negev, Inc. v. Minister of Defense, 28 P.D.(2) 449 (1974).

The Court would derive its standards for statutory interpretation from its own understanding of the rule of law as a judicial function not subject to legislative dictate.

This doctrinal development would not be a claim of judicial supremacy over the Knesset. It would instead be a claim that the judges are not subordinate to the Knesset and that when they are asked (by a grant of jurisdiction) to participate in the effectuation of a statute, they must apply their own norms of legal propriety to that statute. The Knesset could displace the judges' understanding of the rule of law ideal by withholding jurisdiction from them; it could not, however, force the judges to subjugate their understanding of this ideal by a directly contrary legislative command.

The applicable constitutional norm at work is separation of powers. This norm would not arise from any written text but from the Court's portrayal of the inherent "nature of the judicial function."[276] This perception of the judicial role would arise—indeed, it already has implicitly arisen in Israeli practice since 1967—in response to the Court's high prestige as the only institution that stands above partisan political dispute. If the Knesset not only contradicted the Court but also attempted to enlist it by jurisdictional grant in the implementation of these contradicted purposes, the Court would see itself not merely as an agent of the Knesset's partisan political designs (which would be offensive enough to the Justices' sensibilities). More fundamentally, the Court would perceive the Knesset as attempting to

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276 This need not mean that judges would directly invalidate Knesset enactments (except in the special circumstances of "entrenched laws" denoted by the *Bergman* doctrine). A plausible, and less radical, extrapolation from current practice would be for Israeli courts to employ their own standards of proof in applying statutes or evaluating administrative actions under statutes; and, in particular, to impose stringent proof standards (such as "proximate certainty of grave harm") where the statute or administrative action impinges on judicially favored principles such as free speech or political association. Under current Israeli Supreme Court practice, this course has regularly been followed where the legislature has been silent or ambiguous in prescribing proof standards. See, e.g., supra notes 243-49 (the public demonstration cases and Kahane v. Executive Bd. of the Broadcast Auth., HC 399/85 (July 27, 1987)). From the perspective of the "separation of powers" principle, a court would justify its own stringent proof standards, even overriding a direct legislative command, on the ground that the application—though not the enactment—of laws is a "judicial" function. Accordingly, when the legislature enlists courts to carry out or to accept appeals under its enactments, it must be deemed to have subjected itself to the application of judicially crafted proof standards.

This judicial use of stringent proof standards would be akin to the American judicial practice of "strict scrutiny" where fundamental rights are at stake. The difference would be that American courts often use "strict scrutiny" wholly to invalidate statutes on the ground that the legislature had not found the required close nexus between the "compelling state interest" and the means chosen to vindicate that interest. Under the "separation of powers" principle, the Israeli courts would in effect apply "strict scrutiny" to constrain each application of such statute, but not to invalidate it altogether.

trade on its nonpartisan public prestige while dragging it into partisan political conflict. In this context, the constitutional principle of "separation of powers" should have considerable attraction for the Court. This application of the principle would capture the essence of the institutional self-definition, and the accompanying public attitude toward the Court, that has progressively evolved since 1967.

The recent scandal about perjured testimony by the Israeli General Security Service can illustrate the potential uses and attraction of this principle for the Supreme Court. Shortly after the 1967 War, intelligence officers began a practice of obtaining confessions from suspected terrorists by various coercive means and, in subsequent criminal proceedings, lying under oath about the use of these means.[277] These practices became public in 1987 and a Commission of Inquiry was convened, chaired by Justice Moshe Landau. The Commission denounced the perjurious conduct: "giving false testimony in court . . . has now been exposed for all to see and . . . deserves utter condemnation. . . . This evil must be eradicated, for it is a matter of life and death for us all, in the full sense of the term."[278] The basic evil that the Commission perceived was not in the coercive interrogation techniques,[279] but in the blatant challenge embodied in the officially sanctioned perjury to the integrity of the judicial process and thus to the ideal of the rule of law.[280]

Imagine, however, that after publication of the Landau Commission Report, the Knesset responded by providing that in all judicial proceedings where an officer of the General Security Service testifies regarding the circumstances in which a defendant's confession was obtained, the court is obliged to accept the officer's testimony as truthful. Imagine further that in a specific proceeding the defendant calls the proverbially requisite assemblage of clergy who contradict the intelligence officer's testimony. Must the court ignore these witnesses, notwithstanding the plausibility of their accounts, because the

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277 Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity Report, pt. 1, at 21-23 (1987) [hereinafter Commission Report].

278 Id. at 4.

279 "[W]e are not referring to the methods of interrogation . . . employed—which are largely to be defended, both morally and legally." Id.

280 This concern pervades the Commission's Report. In its general conclusion, the Commission observed that the Security Service's

> top echelon failed by not comprehending that no activity in the field of security, however important and vital it may be, can place those acting above the law. It did not understand that it was entrusted with a vital task, which perhaps justified means, but not all means, and certainly not the means of giving false testimony.

Id. at 40.

Knesset has commanded it to accept perjured testimony from an intelligence officer? Must the court refuse even the proffer of the clerical testimony on the ground that the Knesset has required it to shut its eyes to the possibility of perjury? Either course would surely implicate the judges in the same breach of duty for which the Landau Commission sharply criticized the intelligence service Legal Advisers: "These were jurists for whom telling the truth in Court must be a supreme value."[281]

The constitutional principle of parliamentary supremacy might be construed to impose a conflicting and even superior duty on the Court by the Knesset enactment that it was barred from adhering to this previously "supreme value" of "telling the truth in Court."[282] The Court could, however, protect its own institutional integrity and the values of the rule of law embedded in that integrity by insisting that the Knesset could not force it to accept perjured testimony or to give the patina of legitimacy to this testimony that judicial acceptance will necessarily imply.

This judicial stance would not directly challenge the Knesset's authority to punish suspected terrorists on the basis of perjured testimony in some extrajudicial forum. It would instead create an indirect pressure on the Knesset by withholding judicial assistance from the legislative project of combatting terrorism by use of perjured testimony. Such judicial use of the separation of powers norm would thus limit the general constitutional principle of parliamentary supremacy. This judicial refusal would also serve an educative function for Israeli society in forcing public acknowledgment by the Knesset that in its war against terrorism, it was prepared to override a basic tenet of the rule of law ideal. Judicial participation in this war on such terms, by implementing the Knesset directive to accept testimony without regard to its perjured character, would obscure this basic reality. This application of the separation of powers norm would thus vindicate the "supreme value" of "telling the truth in Court."[283] In this sense, the

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281 Id. at 38. The Commission noted that one Legal Adviser had written a "hefty tome called 'Legal Aspects in the Work of the [General Security Service],' including a long and detailed chapter about 'Israel as a Law-Abiding State.' " Id. The Commission continued:

> It is a pity that he did not study what he himself wrote. He concluded his long and embarrassing testimony before us by declaring that he thought he was serving the important interests of the state of Israel by ignoring the lying. . . . [Another] Legal Adviser replied to a question . . . [that] he would have instructed [an intelligence officer] to lie in his testimony. These words, when uttered by a jurist and a legal adviser, make one shudder.

Id.

282 Id.

283 Id.

constitutional principle of parliamentary supremacy would remain intact only as a shield for the Knesset against judicial supervision. The principle would not, however, be available as a sword for the Knesset to use against a supinely obedient Court.

The Israeli Supreme Court has not (or at least not yet) endorsed this separation of powers norm as a limit on the parliamentary supremacy principle. Justice Barak has, more clearly than any other member of the Court, staked a claim for such independent judicial stance; but even his claim is not very clear. In the 1985 decision overturning the Knesset Chairman's refusal to accept a no-confidence motion submitted by Kahane, Barak stated:

> In a democratic regime based on the separation of powers, the authority to interpret legislative acts . . . is vested in the Court. The Chief Justice of the U.S. Supreme Court, Marshall J., referred to this in *Marbury v. Madison* (1 Cranch. 137 (1803)) stating:
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> > "It is emphatically the province and duty of the judicial department to say what the law is."
>
> It is self-evident that every statutory provision, by its very nature, entails the delegation of interpretative authority to the Court.[284]

Barak immediately added this qualification:

> Of course, even after a legislative act is interpreted by the court, the law can be changed by lawful amendment of the legislative act. Moreover: in the absence of a formal constitution, the primary legislature . . . might grant the power of binding interpretation to another state organ and divest it from the court in any given area. But to that end there must be express provision by the primary legislature.[285]

It is not clear whether, in this qualification, Barak envisioned that the legislature could effect its intention by directing the Court to accede to the later interpretation made by "another state organ," or whether the only way for the legislature to vest binding interpretive authority in a nonjudicial institution—"in a democratic regime based on the separation of powers," as Barak put it—would be to exclude the judiciary altogether by removing its jurisdiction over the particular statute.

In the case at hand, Barak did not need to resolve this ambiguity. Indeed, in this case, the Court was overturning a statutory interpretation made by the Chairman of the Knesset. Barak's observations may thus refer to nothing more than the preferable position of the judiciary as compared to a subordinate legislative official in the interpreta-

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284 Kach Party v. Hillel, Chairman of the Knesset, 39 P.D.(3) 141, 152 (1985).
285 Id. at 154.

tion of statutes. But Barak's tone—including his specific reference to *Marbury* and the fact that the subordinate legislative official was, after all, the Knesset Chairman—suggests that he was addressing larger issues of relations between the judicial and legislative branches.

In any event, these observations are only Barak's and their import even for his position is unclear. More recently, in the 1988 Kach Party electoral exclusion case, the Court explicitly affirmed the proposition that it has no authority to overturn Knesset laws for violations of "fundamental rights."[286] At the same time, however, the Court observed that its interpretation of any legislation "abridg[ing] a basic constitutional right" would be "strict, narrow and reductionist. . . . In other words, the provisions of the legislation . . . should be applied while adopting an approach that takes into account the considerable weight attaching, *in accordance with our conceptions*, to the basic freedoms."[287] In this case, the Court upheld the exclusion of Rabbi Kahane's party from the 1988 Knesset election—a result that had been the obvious intent of the Knesset law. The Court thus did not directly confront the Knesset with any claim for independent interpretive authority. There is little indication that the Court is eager for this confrontation. The force of events may yet, however, press it forward.

C. *The Convergence of Israeli and American Doctrine*

The separation of powers rationale available for justifying independent judicial review in Israel has a distinguished lineage in American practice. It was the core justification of John Marshall's claim in *Marbury* for judicial authority to invalidate the specific congressional act at issue. This rationale was the holding on which judicial review was founded, as opposed to Marshall's dicta implying a more grandiose judicial role as the Guardian of the Constitution.

Marbury invalidated section 13 of the Judiciary Act of 1789 which, as Marshall read it, vested original jurisdiction in the Supreme Court to issue writs of mandamus.[288] Marshall held that Article III, section 2, clause 2 of the Constitution explicitly forbade the Court

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286 Kach Party v. Chairman of the Cent. Elections Comm., — P.D. — (decided October 18, 1988) (official translation at 4). The appellant had directly argued that the Court should declare the Knesset law "null and void" on the ground that it "conflict[ed] . . . with the democratic-constitutional regime of the State of Israel." The Court responded, in an opinion by President Shamgar, that it "does not consider itself authorized to scrutinize the validity of Knesset legislation, with the exception of cases involving a formal argument concerning the manner in which a law was enacted" as in the *Bergman* case. Id.

287 *Kach Party*, — P.D. — (official translation at 7) (emphasis added).

288 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

from exercise of this original jurisdiction.[289] After discussing general reasons why the Constitution bound the legislature and why the judiciary should enforce the "law" of the Constitution against legislative infringements, Marshall set out three hypothetical examples to clinch his case: an export duty imposed by Congress, notwithstanding the explicit prohibition in the Constitution, "and a suit instituted [by a customs official] to recover it"; a bill of attainder or ex post facto law passed by Congress, notwithstanding the explicit constitutional prohibition, and a "person [is] prosecuted under it"; and a congressional law defying the explicit constitutional conditions for treason convictions by reducing the required number of witnesses from two to one or by admitting confessions made "out of court."[290] In all of Marshall's examples, Congress would not simply have violated the explicit commands of the Constitution but would have directed the courts actively to participate in their violations.

After setting out these examples, Marshall proceeded to his argument that judicial review authority arises from the fact that the Constitution "direct[s] the judges to take an oath to support it."[291] As many subsequent commentators have argued, this oath argument does not support judicial supremacy since members of Congress and the President take the same oath.[292] But in the context of the specific examples Marshall had adumbrated, the oath argument was not intended to establish judicial supremacy: "This oath," Marshall said, "certainly applies, in an especial manner, to [the judges'] conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"[293] This is the separation of powers rationale for judicial review authority at the core of *Marbury*—not judicial supremacy but equality with the legislature or, more precisely, a principle of nonsubjugation. The legislature, that is, cannot force the judges to subordinate their understanding of a constitutional ideal.

This principle rests on the specific existence of a direct legislative command for judicial participation in carrying out the legislature's purposes. This command could be for criminal or civil law enforcement of a statute, or it could simply be a grant of jurisdiction to accept privately initiated challenges to the administration of the law. In

289 Id. at 147.

290 Id. at 179.

291 Id. at 180.

292 See Eakin v. Raub, 12 Serg. & Rawle 330, 353 (Pa. 1825) (Gibson, J.).

293 5 U.S. (1 Cranch.) at 180.

either event, the judges would be directly implicated in the legislature's enterprise. By this principle, however, the legislature could exclude courts altogether from its enterprise by relying on nonjudicial enforcement and by withholding all review jurisdiction. In these circumstances, the existence of any judicial authority to countermand constitutional violations by the legislature must rest on a claim for judicial supremacy and must thus find support from some principle other than this separation of powers rationale.

It is a striking fact about American constitutional jurisprudence that the question of the existence of this other principle has never been settled. Aside from a few ambiguous nineteenth-century precedents, the Supreme Court has never authoritatively addressed whether Congress is free to withhold all jurisdiction from federal or state judicial tribunals and thereby to nullify all possibility of judicial review to enforce constitutional norms. Most modern constitutional law scholars maintain that the Court today should rule that such blanket jurisdictional denial would violate the Constitution, on the premise that some access to judicial review is (or has become) an essential feature of our constitutional scheme.[294] This answer is, however, much less interesting than the fact that the question remains open to debate even in the post-bicentennial era and 185 years after *Marbury* supposedly "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[295]

The question remains open—but not because it is pedantic or obscure, and not because members of Congress have failed to notice the possibilities of depriving courts of jurisdiction to protect their work against invalidation. Legislative proposals to withhold constitutional review jurisdiction have repeatedly been introduced in the nineteenth and twentieth centuries. Such measures are now pending in Congress regarding abortion laws and have been prominently considered in re-

294 See, e.g., Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953) ("the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan"); Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981); Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 Harv. C.R.-C.L. L. Rev. 129 (1981). But see C. Black, Decision According to Law: 1979 Holmes Lectures 37-39 (1981) (Congress may restrict federal court jurisdiction to entrust constitutional enforcement to state courts); M. Perry, The Constitution, The Courts, and Human Rights 128-33 (1982) (Congress has authority to withhold all constitutional review jurisdiction from federal, and perhaps even state, courts).

295 Cooper v. Aaron, 358 U.S. 1, 18 (1958). For a criticism of the accuracy of this rhetorical flourish, see Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 25 (1964).

cent past Congresses regarding such matters as criminal law procedural protections, prayer in public schools, congressional investigation procedures, and exclusion of alleged Communists from bar membership.[296] In this century, however, none of these punitive jurisdiction-withholding statutes has been enacted by Congress. The Court has thus had no direct occasion to consider the extent of congressional authority to deprive it of constitutional review jurisdiction. But, by the same token, Congress has not considered itself directly barred from contemplating these deprivations; it has done so repeatedly, and at least informally conveyed messages of displeasure to the Court.

This tacit standoff between the Court and Congress reflects the dominant underlying characteristic of their institutional relationship. Notwithstanding much persistent grumbling on the congressional side and occasional aggressive thrusts mostly on the judicial side, both branches predominantly have treated one another with wary respect. Beneath this respectfulness, the relative authority of the Court has grown in slow, incremental accretions;[297] but both sides have remained aware of the considerable formal and practical resources available to a resistant Congress.[298] This same pattern of judicial-legislative relations is apparent today in Israel, though it is in its earlier stages. The Israeli Supreme Court has had a version of *Dred Scott* in the *Elon Moreh* case; it has not yet, and may never, come into the *Lochner* era of claims for judicial supremacy. Israeli judicial authority does appear, however, to be launched on a gradually steady upward trajectory.

I have suggested one basic historical commonality between Israel and America that accounts for this parallel trend: the vivid experience of civil conflict that produces a widespread wish for some formal institutional actors apparently able to transcend this conflict. The experience of actual or incipient civil warfare is not, however, the whole

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296 See G. Gunther, Cases and Materials on Constitutional Law 55-57 (10th ed. 1980).

297 One measure of this growth is the simple numbers of congressional statutes declared unconstitutional by the Court in successive eras: eleven in 1860-79; nine in 1880-99; fifteen in 1900-19; thirty-one in 1920-39; seven in 1940-59; thirty-eight in 1960-79; and sixteen in the limited period of 1980-87. Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 1883-1912 (1987).

298 Compare the observations of the Court of Appeals for the Fifth Circuit in 1966, little more than a decade into its attempt to enforce the Supreme Court's mandate in Brown v. Board of Educ., 347 U.S. 483 (1954): "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*" United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967) (emphasis in original).

explanation. In both America and Israel this experience was considered both unnecessary and intolerable—for reasons and in ways that readily led to the growth of an imagined transcendence in judicial authority. The experience of conflict was considered unnecessary in both places because of the existence of a creedal basis for national unity formulated at a specific founding moment. In America the creed was political equality, in Israel it was a national home for the Jewish people—both expressed in Declarations of Independence. These creeds were subject to radically different interpretations: in antebellum America, the white South claimed political equality to protect the maintenance of slavery and ultimately to secede from the Union, while the white North interpreted equality to bar the expansion of, and ultimately to abolish, slavery. In Israel, the claim for a national Jewish home has different meanings in secular and religious hands, and in attitudes toward internal and external relations with Arabs. In both countries, however, the foundational existence of an explicit creedal formulation persistently fed the idea that the creed had a single discernable meaning that could be definitively invoked to transcend political conflict. Hence, the ethereal judicial role vested in the Supreme Court by the framers of the Fourteenth Amendment; hence also the claim of even a sober and skeptical judge like Moshe Landau in the *Elon Moreh* case to communicate with "the authentic voice of Zionism."[299]

Intense political conflict was also considered intolerable in both countries for a similar reason: that the victory of one partisan group over another quickly translated in popular imagination into the utter subjugation, even the destruction, of the defeated party. Notwithstanding ritualistically repeated public reassurances in both countries that sharp partisan conflict was a wholesome expression of the finest democratic elements in their respective social arrangements, this conflict was not widely seen as essentially benign or self-restrained. The reason for this underlying fear appears rooted in specific historic experience. For Israel the experience was in the immediate searing memories of the Holocaust and the insistent threat to the state's existence from the hostile Arab encirclement. Most Israelis do not consciously believe that internal political conflict will suddenly be transformed into wholesale murderous assaults among Jews. Internal conflict is, however, emotionally laden with the taint of these viciously unconstrained surrounding events.

For America, the equivalent experience was first the maintenance of black slavery, then the Civil War, and then the reenslavement of

299 *Elon Moreh*, 34 P.D.(1) at 12, Appendix A, supra note 194, at 415.

blacks as the condition for reunion and the perpetuation of black oppressed status into this century. From the very beginning of American national experience, the presence of a large mass of black slaves vividly implied to the white elites that their own economic and social status—and for Southerners even their lives—rested uneasily on the utter subjugation of (potential) opponents whose continued containment seemed an almost inexplicable political achievement. The background presence of these threatening slaves persistently intruded into internal political struggles among the white elites. This occurred even at the beginning of our national union when, in the drafting of the Constitution, the white Southerners betrayed exaggerated fears of the threats to slavery, and the accompanying support for slave uprisings, likely to come from the white North—fears that the Northerners quickly and fulsomely allayed by entrenching slave status in the constitutional scheme. White Southerners were appeased, but only for a time; at least from 1820 onward, every significant issue of political dispute—the controversy over the national Bank, the tariff, and internal improvements—was viewed, at least by white Southerners, as a barely veiled attack on their capacity to contain their slave population. At last in 1861, the internecine war erupted, thus rendering visible the fearful underlying American conception of the true stakes in political conflict: victory or enslavement, kill or be killed.

This shared Israeli and American conception of the unconstrained violence lurking just beneath the surface of all political relations suggests two related explanations for the growth of judicial authority: it indicates both why sharp partisan conflict is widely perceived as intolerable, and why the specific style of transcendent judicialized authority appears as an attractive alternative to such conflict.[300] These explanations are brought together in the political phi-

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[300] Elaine Scarry, in her extraordinary book about the implications of bodily injury in the constitution of political identity, offers a parable for the development of judicial authority in Israel and America:

> A dispute arises between two populations. In order to determine a winner, they agree to have a contest. They could have either an extravagant three-year-long song contest or instead a three-year-long war. They choose the second because, though each would allow the designation of a winner and a loser, injuring—unlike singing—will carry the power of its own enforcement. But after moving through three autumns, three winters, three springs, and two summers during which they butcher one another (if the word is ugly, the acts it represents are far uglier) they begin to approach the third summer, and they realize that not only will injuring not carry the power of its own enforcement but it will not even make possible the distinction between the winner and the loser: despite fluctuations, the body count on each side tends to approximate that on the other side, and thus to continually re-establish the equality of the two sides rather than to expose their inequality. Thus here, at the end of war, at the very place where the exceptional virtue or the

losophy of Thomas Hobbes. From his experience of the English Civil War, he was led "to a view of society as so completely fragmented that he deduced the need for a self-perpetuating sovereign person or body."[301] Hobbes postulated that all sensible people would, in the interests of self-preservation, see the need to create a transcendent sovereign whom all would obey unquestioningly and who would himself owe obedience to no one.[302] The Hobbesian approach reflects the formal image of the judicial review authority vested in a life-tenured, independent Supreme Court.

Hobbesian absolute sovereignty is only the formal image of judicial authority. It is not the practical reality in American or Israeli political life. But this formal image, impelled by the underlying fear of the unconstrained consequences of political conflict, exerts a powerful imaginative force and is an important part of the explanation for the accretion of judicial authority in both countries.

I cannot say that the presence or absence of these characteristics common to the American and Israeli regimes will explain why other countries have or lack the institution of judicial review. The practice of judicial review has now spread so widely in many different political cultures as to confound the possibility for ready characterizations or generalizations.[303] Perhaps the elements I have seen hold elsewhere. For the moment, it is enough if they make sense of the developments that have taken place in Israel and America.

> exceptional contribution of injuring was to have occurred (and for the sake of which injuring was chosen over any alternative), it is suddenly necessary to make arrangements for the insertion of the song contest into the overarching frame of war. . . . [T]he abbreviated contest does not displace or provide a substitute for the injuries, for thousands of injuries have by this time already occurred and will continue to occur in the final weeks; it instead substitutes for the single element that was thought to necessitate and hence justify the injuring. The fragile song contest (which no one precisely saw, though everywhere here and there it is said voices were heard) is like a small jewel placed down in the midst of a three-year massacre and relied on to perform the very work for the sake of which its own activity had been originally rejected.

E. Scarry, The Body in Pain: The Making and Unmaking of the World 107 (1985).

301 C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 93 (1962).

302 Id. at 92-95.

303 See, e.g., Burt, Privacy and Contraception in the American and Irish Constitutions, 7 St. Louis U. Pub. L. Rev. 287, 287-96 (1988); Kommers, Abortion and Constitution: United States and West Germany, 25 Am. J. Comp. L. 250 (1977); Stith, New Constitutional and Penal Theory in Spanish Abortion Law, 35 Am. J. Comp. L. 513 (1987).